IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 843

INVESTMENT COMPANY INSTITUTE, et al.,

Petitioners,

v.

WILLIAM B. CAMP, Comptroller of the Currency,

and

FIRST NATIONAL CITY BANK,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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DOCKET ENTRIES

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 1083-66

Investment Company Institute, by Dorsey Richardson, its President; Investors Diversified Services, Inc; Investors Management Company, Inc.; Hugh W. Long & Company, Inc.; Wellington Management Company; and Wellington Company, Inc.

Plaintiffs,

v.

James J. Saxon, Comptroller of the Currency,

Defendant,

and

First National City Bank,

Intervenor.

Date	Proceedings
1966	
April 25	Complaint filed
April 25	Complaint and summons issued to U.S. Attorney for the District of Columbia
April 25	Summons and Complaint issued to Attorney General
April 26	Service effected upon U.S. Attorney for the District of Columbia
April 27	Service effected upon the Attorney General
July 18	Answer of Defendant James J. Saxon

July 18	Case calendared
Nov. 30	Motion by Plaintiffs for summary judgment
Nov. 30	Memorandum in support of motion for summary judgment
Nov. 30	Affidavit of Robert L. Augenblick in support of Plaintiffs' motion for summary judgment
Nov. 30	Affidavit of John R. Haire in support of Plaintiffs' motion for summary judgment
Nov. 30	Affidavit of Joseph E. Welch in support of Plaintiffs' motion for summary judgment
Nov. 30	Affidavit of Stuart F. Silloway in support of Plaintiffs' motion for summary judgment
Nov. 30	Affidavit of Adron P. Trantum in support of Plaintiffs' motion for summary judgment
Nov. 30	Affidavit of James F. Fitzpatrick in support of Plaintiffs' motion for summary judgment with exhibits
1967	
April 4	Cross-motion of Defendant for summary judgment and opposition of Plaintiffs' motion for summary judgment
April 4	Affidavit of William B. Camp in support of Defendant's cross-motion for summary judgment
April 4	Affidavit of Robert L. Hoguet, Jr., in support of Defendant's cross-motion for summary judgment
June 6	Reply memorandum of Plaintiff
June 28	Reply memorandum of Defendant
June 28	Supplemental affidavit of James F. Fitzpatrick in support of Plaintiffs' motion for summary judgment with exhibits
June 29	Hearing on Plaintiffs' motion for summary judgment and Defendant's cross-motion for summary judgment

Sept. 27	District Court Opinion denying Defendant's motion for summary judgment and granting Plaintiffs' motion for summary judgment (McGarraghy, J.)
Oct. 10	Defendant's motion for stay pending appeal
Oct. 13	Motion of First National City Bank to intervene as defendant
Oct. 13	Affidavit of Robert L. Hoguet, Jr., in support of First National City Bank's motion to intervene
Oct. 23	Plaintiffs' opposition to motion of First National City Bank to intervene
Oct. 24	Plaintiffs' opposition to motion for stay and to Defendant Saxon's proposed order
Nov. 9	Memorandum granting motion of First National City Bank to intervene and limiting it to the purpose of prosecuting an appeal from the judgment (McGarraghy, J.)
Nov. 9	Judgment of the District Court (McGarraghy, J.)
Nov. 9	Order staying judgment pending ultimate disposition of any appeal taken, provided the Comptroller shall not authorize any national banks to commence operation of a managing agency collective investment fund (McGaraghy, J.)
Nov. 21	Order granting motion of First National City Bank for leave to intervene as a party defendant (McGarraghy, J.)
1968	
Jan. 5	Notice of appeal by Intervenor from judgment of Nov. 9, 1967
Jan. 5	Notice of appeal by Defendant from judgment of Nov. 9, 1967

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT
Nos. 21,661, 21,662

Jul. 11	Order consolidating for the purpose of decision the instant case with the *National Association of Securities Dealers v. Securities & Exchange Commission*
Nov. 27	Hearing in Court of Appeals
1969	
June 21	Judgment of the Court of Appeals (Per curiam)
July 1	Opinions of the Court of Appeals (Bazelon, C. J.; Miller, Burger, JJ.)
Aug. 15	Order denying petition for rehearing
Nov. 6	Order denying motion for stay of mandate and ordering immediate issuance of mandate (Per curiam)

SUPREME COURT OF THE UNITED STATES
No. 843

Nov. 12	Petition for Writ of Certiorari filed
Nov. 18	Order staying mandate pending final disposition (Black, J.)
1970	
Mar. 23	Order granting Petition for Writ of Certiorari

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INVESTMENT COMPANY INSTITUTE
By Dorsey Richardson, Its President
61 Broadway
New York, New York

INVESTORS DIVERSIFIED SERVICES, INC.
Investors Building
Minneapolis, Minnesota

INVESTORS MANAGEMENT COMPANY, INC.
Westminster at Parker
Elizabeth 3, New Jersey

HUGH W. LONG & COMPANY, INC.
Westminster at Parker
Elizabeth 3, New Jersey

WELLINGTON MANAGEMENT COMPANY
1630 Locust Street
Philadelphia, Pennsylvania

WELLINGTON COMPANY, INC.
1630 Locust Street
Philadelphia, Pennsylvania,

Plaintiffs

v.

Civil Action No.
1083-66

JAMES J. SAXON
Comptroller of the Currency
Office of the Comptroller of
the Currency
Fifteenth and Pennsylvania Avenue
Washington, D.C.,

Defendant

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE AND OTHER RELIEF

(Filed April 25, 1966)

Plaintiffs, by their attorneys, bring this action against the above-named defendant and allege:

Jurisdiction and Venue

1. This is a civil action for a declaratory judgment and injunctive and other relief. It arises under Sections 16, 20, 21 and 32 of the National Banking Act of 1933, as amended, (herein referred to as "the Glass-Steagall Act"), codified in Sections 24, 377, 378 and 78, 12 U.S.C., respectively, as well as under Section 92(a), 12 U.S.C. This Court has jurisdiction under the provisions of 12 U.S.C. § 1331; the Declaratory Judgment Act, 28 U.S.C. § 2201-02; the Administrative Procedure Act, 5 U.S.C. § 1009; and the District of Columbia Code, Sections 11-305 and 11-306. Venue is established under the provisions of Section 1391(b) and 1391(e) (1), 28 U.S.C. There exists between each plaintiff and the defendant an actual controversy, justiciable in character, in respect of which plaintiffs require a determination of their rights by this Court. The amount in controversy exceeds $10,000.

Parties

2. Plaintiff Investment Company Institute (herein referred to as the "Institute") is an unincorporated association, having its principal place of business in the City, County and State of New York. At the time of the commencement of this action, Dorsey Richardson was the President thereof. It is a national association having as its members 174 open-end investment companies, and their 87 investment advisers and 78 principal underwriters. Open-end investment companies are commonly referred to, and will herein be referred to, as "mutual funds." The Institute is suing in a representative capacity for all its members which will be injured irreparably by the illegal acts here complained of. The great majority of its mutual fund members is engaged in the

business of issuing and offering for sale redeemable securities which represent an undivided interest in the portfolio of securities owned by the fund. Each mutual fund member is registered as an open-end investment company with the Securities and Exchange Commission (herein referred to as the "SEC") under the Investment Company Act of 1940 (herein referred to as "the 1940 Act"); and the securities issued by each member fund are registered with the SEC under the Securities Act of 1933 (herein referred to as "the 1933 Act"). Together, the mutual fund members of the Institute have assets of over $36 billion (being about 94% of the assets of all mutual funds in the United States) and have approximately 3.5 million shareholders. Each of the investment adviser members of plaintiff Institute is, pursuant to the contractual arrangements required by Section 15 of the 1940 Act, engaged in the business of regularly furnishing to one or more mutual fund members advice with respect to the desirability of investing in, purchasing, or selling securities, or is empowered to determine what securities shall be purchased or sold by such mutual fund. Each of the principal underwriter members of plaintiff Institute is, pursuant to the contractual arrangements required by Section 15 of the 1940 Act, engaged in the business of purchasing from one or more mutual fund members its securities for distribution or, as agent for such mutual fund, selling or having the right to sell the securities of such fund to a dealer or to the public or both.

3. (a) Plaintiff Investors Diversified Services, Inc., an Institute member, is incorporated under the laws of the State of Minnesota and has its office and principal place of business at Minneapolis, Minnesota. It acts as investment adviser and principal underwriter, pursuant to Section 15 of the 1940 Act, to the following open-end investment companies: Investors Mutual Inc.; Investors Stock Fund, Inc.; Investors Variable Payment Fund, Inc.; and Investors Selective Fund, Inc., all of which are Institute members. There are more than three-quarter million investors in these open-end investment companies residing throughout the United States.

Securities of each of these open-end companies are offered for sale and sold throughout the nation, and a substantial number of such shares are offered for sale and sold in the City and State of New York.

(b) Plaintiff Investors Management Company, Inc., is incorporated under the laws of the State of New Jersey and has its office and principal place of business at Elizabeth, New Jersey; plaintiff Hugh W. Long & Company, Inc., is incorporated under the laws of the State of Nevada and has its office and principal place of business at Elizabeth, New Jersey. Both are Institute members. Pursuant to Section 15 of the 1940 Act, Investors Management Company, Inc., acts as investment adviser, and Hugh Long & Company acts as principal underwriter, to the following open-end investment companies currently engaged in issuing and selling their shares, all of which are Institute members: Fundamental Investors, Inc.; Diversified Investment Fund, Inc.; and Diversified Growth Stock Fund, Inc. There are more than 250,000 investors in these open-end investment companies residing throughout the United States. Securities of each of these open-end companies are offered for sale and sold throughout the nation, and a substantial number of such shares are offered for sale and sold in the City and State of New York.

(c) Plaintiffs Wellington Management Company and Wellington Company, Inc., are both incorporated under the laws of the State of Delaware and have their offices and principal places of business at Philadelphia, Pennsylvania. Both are Institute members. Pursuant to Section 15 of the 1940 Act, Wellington Management, Inc., acts as investment adviser, and Wellington Company, Inc., acts as principal underwriter, to the following open-end investment companies currently engaged in issuing and selling their shares, both of which are Institute members: Wellington Fund, Inc., and Windsor Fund, Inc. There are more than 375,000 investors in these open-end investment companies residing throughout the United States. Securities of both of these open-end companies are offered for sale and sold through-

out the nation, and a substantial number of such shares are offered for sale and sold in the City and State of New York.

4. Defendant James J. Saxon is the Comptroller of the Currency (herein referred to as the "Comptroller") and is charged by law with administrative and regulatory authority with respect to national banks. His official residence is Washington, D. C. He is sued in his individual capacity as a result of certain acts here described which were taken in excess of his statutory authority.

5. The purpose of this action is to secure a declaratory judgment, with appropriate injunctive and other relief, that (i) those provisions of the Comptroller's Regulation 9, 12 C.F.R. § 9.18, which permit banks to establish and operate collective investment funds composed of monies deposited with the bank as managing agent (such collective investment funds herein referred to as "bank investment funds") which are functionally identical to mutual funds, and those actions of the Comptroller in approving the application of First National City Bank of New York, a national bank and member of the Federal Reserve System with its office and principal place of business in the City and State of New York (herein referred to as "the Bank"), to operate such a bank investment fund under these regulations, are unlawful inasmuch as they were taken by defendant Comptroller in excess of his statutory authority and in violation of Sections 16, 20, 21 and 32 of the Glass-Steagall Act which prohibit commercial banks from engaging in the securities business and (ii) that the approval of the Bank's plan is illegal and in excess of the Comptroller's statutory authority in that such approval permits activity which is prohibited by Section 92(a), 12 U.S.C.

Claim For Relief Based Upon Glass-Steagall Act

6. The Glass-Steagall Act, enacted in 1933 and amended in 1935, was enacted in substantial part to separate and divorce commercial banks from the securities business. Section 21 of the Act, a criminal section, prohibits

commercial banks from engaging in the business of issuing, underwriting, selling or distributing securities, with certain exceptions not relevant here. Section 16 provides that national banks cannot deal in equity securities, except for purchases and sales made solely upon the order and for the account of customers, and that national banks cannot underwrite any issue of securities. Section 32 prohibits officers and directors of member banks of the Federal Reserve System from serving in similar capacities with any enterprise primarily engaged in the issue, underwriting, sale or distribution of securities. Section 20 provides that no member bank shall be affiliated, as defined in the banking laws, with an organization principally engaged in the issue, flotation, underwriting, sale or distribution of securities. The Comptroller's regulations and action complained of here authorize activity in direct violation of these prohibitions and are thereby in excess of the Comptroller's statutory authority.

7. Upon information and belief, after one year following the passage of the Glass-Steagall Act, and to date, no bank has operated a bank investment fund. The Glass-Steagall prohibitions have consistently been administered to restrain mutual funds from creating interlocking relationships with commercial banks.

8. Prior to the effective date of the Glass-Steagall Act, plaintiff Investors Management Company, Inc., was a corporation organized under the laws of the State of New York and was a wholly-owned subsidiary of Irving Trust Company, a New York state bank and member of the Federal Reserve System. At that time Investors Management Company, Inc., was named Irving Investors Management Company, Inc., and, among other things, served as underwriter and investment adviser for Irving Investors Fund C, Inc., an investment fund operated in a manner virtually identical to the operation of present-day open-end investment companies. In consequence of the passage of the Glass-Steagall Act and rulings of the Federal Reserve Board made pursuant thereto, Irving Trust Company in 1934

divested itself of all of its interest in Irving Investors Management Company, Inc., and in Irving Investors Fund C, Inc. (the name of which was thereupon changed to Investors Fund C, Inc.), and thereafter Irving Trust Company had no further connection with the distribution of the shares of that fund or with the management thereof. In 1954, Investors Fund C, Inc., was merged into the aforesaid Fundamental Investors, Inc., and in 1964, plaintiff Investors Management Company, Inc., was reincorporated under the laws of the State of New Jersey.

9. Until 1962, the statutory authority to regulate the fiduciary activities of national banks was vested in the Federal Reserve Board. The Board consistently and diligently administered its authority until 1962 so as to prohibit any national or member bank from offering to its customers or to the public shares or participations in collective investment funds solely for investment purposes and not for bona fide fiduciary purposes.

10. In September, 1962 the statutory authority to regulate the fiduciary activities of national banks was transferred to the Comptroller of the Currency. 76 Stat. 668, 12 U.S.C. § 92(a). Assertedly pursuant to such authority, on February 4, 1963 the Comptroller issued a notice of proposed rule-making concerning the promulgation of revised rules which, in part, were intended to authorize the collective investment of funds contributed to the bank as managing agent solely for investment purposes, and not for bona fide fiduciary purposes. The Comptroller invited national banks and interested parties to submit comments pertaining to the proposed regulation. Plaintiff Institute, on behalf of its members, participated to the full degree permitted and submitted a statement in opposition to the proposed regulations because they permitted banks to enter the mutual fund business, asserting in part that such activity violated the Glass-Steagall Act. Final regulations were adopted by the Comptroller on April 5, 1963; such regulations were amended February 5, 1964.

11. These regulations permitted banks to create and operate bank investment funds which are the functional equivalents of the mutual fund members of plaintiff Institute and permitted banks, for the first time, to offer for sale securities in the form of participations in bank investment funds for the purpose of general investment. Under these regulations, a bank can pool the moneys of the investing public in a fund which will be invested in equity and other securities, and can operate and manage such fund. A bank investment fund will offer and issue participations to the investing public representing undivided shares in the collective account; these participations will be sold, distributed and underwritten exclusively by a bank and its employees. An investor in a bank investment fund will have the right to redeem his participation–*i.e.*, to draw out his share of the undivided assets in the fund in the form of cash based on net asset value of the participation. In all these particulars, the operation of a bank investment fund authorized by the Comptroller's regulations is indistinguishable in all material respects from the operation of the mutual fund members of plaintiff Institute. The activities of a bank and its employees in advising and managing a bank investment fund and in distributing, selling, and underwriting the participations in a bank investment fund are indistinguishable in all material respects to those of adviser and underwriter members of plaintiff Institute.

12. Pursuant to and under the provisions of such regulations, the Comptroller, on May 28, 1965, approved a plan to operate a bank investment fund submitted by the Bank. Such bank investment fund proposed by the Bank was labelled a "Collective Investment Account" (herein referred to as the "Account"). The Bank's Account will be operated as a bank investment fund essentially as described in paragraph 11. Under the Bank's plan as approved by the Comptroller, the Bank will promote its Account as part of its fiduciary activities, and Bank employees will sell, distribute, and underwrite the participations in the Account to the customers of the Bank and others who desire to invest in the Account.

13. The Bank has publicly announced that it intends to register its Account with the SEC as an open-end investment company under the 1940 Act in a manner similar to the registration of the mutual fund members of plaintiff Institute as open-end investment companies. The Bank on April 21, 1966, filed a registration statement with the SEC for the purpose of registering the participations in the Account as securities under the 1933 Act, in a manner similar to the registration of the securities issued by the mutual fund members of plaintiff Institute. The Comptroller has announced that he has encouraged and supported the Bank's plan to register its Account under the 1940 Act and the securities in the Account under the 1933 Act.

14. Notwithstanding the fact that the Bank, with the approval of the Comptroller, intends to register its Account with the SEC under the 1940 Act as an open-end investment company, the Federal Reserve Board, in a formal ruling, has erroneously held that the arrangement proposed by the Bank to operate a bank investment fund does not violate the prohibitions of Section 32 of the Glass-Steagall Act against interlocking relationships because, in its view, the Account is merely an arm or department of the bank. 30 Fed. Reg. 12836 (1965), adding 12 C.F.R. § 218.111. The said ruling does not refer to the legality of the Bank's plan under Sections 16 and 20 of the Glass-Steagall Act, and it explicitly states that the Federal Reserve Board "expressed no position with respect to whether" the proposed activity by the Bank, approved under the Comptroller's regulations here challenged, violates Section 21 of the Glass-Steagall Act.

15. The Bank intends to commence operation of its Account in the near future and commence offering for sale the participations in its Account to customers of the Bank and others. Similarly, other national banks have indicated that they plan to seek approval of plans under the Comptroller's regulations here challenged to permit them to operate bank investment funds. The Comptroller has stated

in violation of Sections 16, 20, 21 and 32 of the Glass-Steagall Act; and

(2) this Court declare that the Comptroller's approval of the Bank's plan to operate a bank investment fund under such regulations is illegal, in excess of his statutory authority, void, and of no effect inasmuch as it was made pursuant to regulations which are illegal under Sections 16, 20, 21 and 32 of the Glass-Steagall Act; and

(3) this Court declare that the Comptroller's approval of the Bank's proposed plan to operate its Account is illegal, in excess of his statutory authority, void, and of no effect, inasmuch as it permits activity which is not permitted by the provisions of Section 92(a), 12 U.S.C.; and

(4) this Court order that the Comptroller set aside any portion of Regulation 9 declared illegal pursuant to prayer (1) above and enjoin the Comptroller from authorizing any bank to operate bank investment funds under such regulations; and

(5) this Court enjoin the Comptroller from continuing in effect any prior approval to any bank, including his approval of the Bank's plan, which might have heretofore permitted the operation of bank investment funds under such illegal regulations, and to order that he set aside or rescind any such prior approval; and

(6) that the Court grant such other and further relief as may be appropriate.

/s/ G. Duane Vieth
/s/ James F. Fitzpatrick
/s/ Charles R. Halpern
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Attorneys for Plaintiffs

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

ANSWER

(Filed July 18, 1966)

Defendant, James J. Saxon, Comptroller of the Currency, by his undersigned attorneys, in answer to the complaint herein, admits, denies and alleges as follows:

1. Defendant admits the allegations contained in the first sentence of paragraph 1 of the complaint. Defendant denies the remaining allegations contained in paragraph 1 of the complaint, and refers the Court to the text of the various statutes cited in paragraph 1 of the complaint for the terms thereof.

2 and 3. Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2 and 3 of the complaint, except that defendant denies the allegations that the acts of defendant are illegal and denies that plaintiff Institute or its members will be, are, or have been irreparably or otherwise injured.

4. Defendant denies the allegations contained in paragraph 4 of the complaint, except that he admits that he is the Comptroller of the Currency, that his official residence is

Washington, D.C., and refers the Court to the text of the National Bank Act, 12 U.S.C. 1 et seq., for the statutory authority of the Comptroller of the Currency.

5. Defendant denies the allegations contained in paragraph 5 of the complaint, except that defendant admits that on May 10, 1965, he gave specific approval under provisions of Section 9.18 (c) (5) of the Comptroller's regulations, 12 CFR 9.18(c) (5), to the establishment and operation of the Commingled Investment Account proposed by First National City Bank, and the Court is respectfully referred to the text of the Comptroller's Regulation 9, 12 CFR § 9 et. seq., and to the text of the various statutes cited in paragraph 5 of the complaint for the terms thereof.

6. Defendant denies the allegations contained in paragraph 6 of the complaint, except that defendant admits that the Glass-Steagall Act was enacted in 1933 and thereafter amended, and defendant refers the Court to the text of the various statutory provisions cited in paragraph 6 and to the text of the Comptroller's regulations for the terms thereof.

7 and 8. Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 7 and 8 of the complaint.

9. Defendant neither admits nor denies plaintiffs' paraphrasing of the Federal Reserve Act, 12 U.S.C. 248(k), as repealed and supplemented, 76 Stat. 668 et. seq., 12 U.S.C. 92a, contained in the first sentence of paragraph 9 of the complaint, but refers the Court to those sections for an exact statement of the terms and provisions thereof. Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last sentence of paragraph 9 of the complaint.

10. Defendant neither admits nor denies plaintiffs' paraphrasing of the Federal Reserve Act, 12 U.S.C. 248(k), as

repealed and supplemented, 76 Stat. 668 et. seq., 12 U.S.C. 92a, contained in the first sentence of paragraph 10 of the complaint, but refers the Court to those sections for an exact statement of the terms and provisions thereof. Defendant denies the remaining allegations contained in paragraph 10 of the complaint, except that he admits that on January 31, 1963, he issued a notice of proposed rule making, published in the Federal Register at 28 F.R. 1111; that plaintiff Institute participated to the full degree permitted in the rule making proceedings and submitted a statement in opposition to the proposed regulations; that regulations were adopted by the Comptroller of the Currency on April 5, 1963, and published in the Federal Register at 28 F.R. 3309; and that the regulations were amended and the amendments published in the Federal Register at 29 F.R. 1719; and the Court is referred to the text of the notice for proposed rule making, the regulations as adopted and thereafter amended for the terms thereof and to the statement in opposition submitted by plaintiff Institute for the position asserted therein.

11. Defendant denies the allegations contained in paragraph 11 of the complaint, and refers the Court to the text of the Comptroller's Regulations 9, 12 CFR § 9 et seq., for the terms thereof.

12. Defendant denies the allegations contained in paragraph 12 of the complaint, except that he admits that on May 10, 1965, the Comptroller of the Currency gave specific approval under the provisions of the Comptroller's Regulation 9 to the establishment and operation of the Commingled Investment Account proposed by First National City Bank, and the Court is respectfully referred to the conditions of the specific approval granted by the Comptroller, the prospectus of the Commingled Investment Account filed with the Comptroller of the Currency by First National City Bank in connection with its request for the approval of such Account by the Comptroller of the Currency, and to applicable statutes and regulations for the manner of operation of said Account.

13. Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 13 of the complaint. Defendant denies the remaining allegations contained in paragraph 13 of the complaint, except that he admits that on April 20, 1966, registration statements relating to the Commingled Investment Account were filed with the Securities and Exchange Commission and refers the Court to the text of the registration statements for the terms thereof; and that on August 25, 1965, the Office of the Comptroller of the Currency issued a statement supporting and approving the plans of First National City Bank to establish a commingled fund for agency accounts and refers the Court to the text of such statement.

14. Defendant denies the allegations contained in paragraph 14 of the complaint, except that he admits that the Federal Reserve Board issued a ruling dated September 29, 1965, and published in the Federal Register at 30 F.R. 12836, and the Court is referred to the text of said ruling for the terms thereof.

15. Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first two sentences of paragraph 15 of the complaint, except that defendant admits that First National City Bank has commenced the operation of its Commingled Investment Account, and denies the allegations contained in the last sentence of paragraph 15 of the complaint.

16. Defendant denies the allegations contained in paragraph 16 of the complaint, and refers the Court to the text of the various statutes and regulations of the Comptroller of the Currency cited for the terms thereof.

17. Defendant denies the allegations contained in paragraph 17 of the complaint, and refers the Court to the text of the statutes cited for the terms thereof.

18. Defendant denies the allegations contained in paragraph 18 of the complaint, and specifically denies that there

exists in this action a justiciable case or controversy between plaintiffs and the defendant and further defendant specifically denies that plaintiffs have standing to maintain this action.

19. Defendant denies the allegations contained in paragraph 19 of the complaint.

20. Defendant denies each and every allegation of the complaint not herein admitted, qualified, or denied.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs lack standing to maintain this action.

SECOND AFFIRMATIVE DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

THIRD AFFIRMATIVE DEFENSE

The complaint fails to allege the existence of a justiciable case or controversy.

FOURTH AFFIRMATIVE DEFENSE

The complaint fails to state a claim upon which relief can be granted.

WHEREFORE, having fully answered, the defendant, the Comptroller of the Currency of the United States, prays:

1. That the relief requested by the plaintiffs be denied and that the complaint be dismissed; and

2. That the defendant be given all such other and further relief as the Court may deem just and proper.

Respectfully submitted,

John W. Douglas
Assistant Attorney General

Harland F. Leathers

Irwin Goldbloom
Attorneys, Department of Justice
Washington, D.C. 20530

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
(Filed November 30, 1966)

Each of the plaintiffs moves the Court on the Complaint filed in this case, Plaintiffs' Statement of Material Facts as to which There is No Genuine Issue, and the Affidavits in support of plaintiffs' motion for summary judgment filed by Robert L. Augenblick, Joseph E. Welch, Stuart F. Silloway, John R. Haire, Adron P. Trantum and James F. Fitzpatrick, for summary judgment under Rule 56 of the Federal Rules of Civil Procedure and for the relief prayed for in the Complaint, on the ground that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law.

/s/ G. Duane Vieth
/s/ James F. Fitzpatrick
/s/ Charles R. Halpern
1229 – 19th Street, N.W.
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Attorneys for Plaintiffs

Of Counsel:

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Washington, D.C. 20036

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Titled Omitted in Printing]

AFFIDAVIT OF ROBERT L. AUGENBLICK
IN SUPPORT OF PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT

(Filed November 30, 1966)

STATE OF NEW YORK SS:

COUNTY OF NEW YORK

ROBERT L. AUGENBLICK, being first duly sworn, deposes and says as follows:

1. I am President and General Counsel of the Investment Company Institute (herein referred to as the "Institute"), a plaintiff in this suit. I submit this affidavit in support of plaintiffs' motion for summary judgment in this action.

2. The Institute is an unincorporated association, having its principal place of business in the City, County, and State of New York. At the time of the commencement of this action, Dorsey Richardson was the President thereof; on October 6, 1966, affiant became President thereof. The Institute is a national association, having as its members, as of October 1, 1966, 177 open-end management investment companies and their 88 investment advisers and 78 principal underwriters. Together, the open-end management investment companies which are members of the Institute have assets of about $32 billion, representing about 93 percent of the assets of all such companies in the United States, and have approximately 4 million shareholders.

3. Open-end management investment companies, as defined by the Investment Company Act of 1940, 15 U.S.C. §§ 80a-3–80a-4, are commonly referred to as "mutual funds". Virtually all mutual funds are engaged in the business of continuously issuing securities which represent an undivided interest in the fund's assets. Most mutual funds are corpo-

rate in form and the securities issued by them usually consist of capital stock. There are, however, a number of mutual funds in a variety of noncorporate forms, and the securities issued by some of them are variously denominated as "beneficial interests," "participating agreements," and the like. The proceeds from the sale of the securities issued by the fund are invested in a portfolio of securities of various kinds, in accordance with the stated investment policy of the particular fund. Some funds invest primarily in securities offering current income; others concentrate on long-term growth securities; still others specialize in particular industries or classes of securities; and many offer various combinations of objectives. The shareholder in a mutual fund is entitled at any time to redeem his interest, usually at net asset value, or in a few cases upon payment of a modest charge. To facilitate this redemption privilege, as well as to establish a price at which new shares are being offered, the value of a share in a mutual fund is calculated regularly, typically twice daily, on the basis of the market value of the securities held by the fund. This continuous process of redemption would restrict and contract the size of the mutual fund unless it continuously issued and offered new securities for sale. Virtually no shares in mutual funds are traded from one investor to another, and there is no significant trading market for such shares. In almost all cases, shareholders in mutual funds desiring to obtain cash for their shares redeem them with the issuing company.

4. The securities issued by most mutual funds are offered to the public at a price which includes a sales commission (or sales load). There are, in addition, a significant number of mutual funds whose shares are sold with no sales commission charged. Such funds are frequently called "no-load" mutual funds. The mutual fund members of the Institute include 23 "no-load" funds.

5. The activities of mutual funds are under the control of a board of directors or board of trustees. Directors and trustees are elected annually by the vote of a majority of the fund's outstanding voting securities. Mutual funds usu-

ally contract with an outside investment adviser for investment advice and other management services, and with a principal underwriter for the distribution of the fund's shares, pursuant to the statutory pattern established by the Investment Company Act of 1940, 15 U.S.C. § 80a-15, *et seq.*

6. The investment adviser of a mutual fund furnishes advice to the fund with respect to its investment portfolio and the securities it should buy, hold, and sell. In some cases, the adviser itself is empowered to purchase and sell securities for the fund. Typically, the investment adviser also furnishes other supervisory and administrative services to the mutual fund. The investment adviser receives compensation for its services, usually in the form of a fee based on the total value of the assets being managed. Plaintiffs, Investors Diversified Services, Inc., Investors Management Company, Inc., and Wellington Management Company, all serve as investment advisers to a number of mutual funds, and each of said plaintiffs and all the mutual funds they serve are members of the Institute.

7. The principal underwriter of a mutual fund is engaged in the business of selling and distributing the securities issued by the fund to the investing public through brokers or dealers, or directly through the underwriters' own salesmen, or both. The principal underwriter either purchases the securities issued by the fund for resale or acts as agent for the fund in distributing the securities. Except in the case of a no-load fund, the principal underwriter receives a fee for its services, usually in the form of a portion of the sales commission included in the selling price of the shares issued by the mutual fund. Plaintiffs, Investors Diversified Services, Inc., Hugh W. Long & Company, Inc., and Wellington Management Company, all serve as principal underwriters for a number of mutual funds, and all those plaintiffs and the mutual funds they serve are members of the Institute.

8. Each of the 177 mutual fund members of the Institute is registered with the Securities and Exchange Commis-

sion under the Investment Company Act of 1940. The activities of the mutual funds and their relationships with affiliated persons and others are all subject to detailed supervision and regulation under that Act. The investment advisers and principal underwriters for each mutual fund, including the investment advisers and principal underwriters who are plaintiffs herein, perform their services for the mutual funds they serve pursuant to contracts, the terms, execution and continuation of which are subject to the provisions of Section 15 of the Investment Company Act, 15 U.S.C. § 80a-15.

9. The securities issued by each of the mutual fund members of the Institute are registered with the Securities and Exchange Commission pursuant to the Securities Act of 1933. All such securities are offered to the investing public by means of a prospectus which is initially filed with the Securities and Exchange Commission under the Securities Act as part of the registration statement for the securities to which the prospectus relates. See, for example, the following prospectuses for the sale of mutual fund shares:

Prospectus dated January 5, 1966 for Investors Mutual, Inc., one of the mutual funds for which plaintiff, Investors Diversified Services, Inc., acts as principal underwriter. (Exhibit 1).*

Prospectus dated April 1, 1966 for Fundamental Investors, Inc., one of the mutual funds for which plaintiff, Hugh W. Long & Company, Inc., acts as principal underwriter. (Exhibit 2).

Prospectus dated April 1, 1966, supplemented November 1, 1966, for Wellington Fund, Inc., one of the mutual funds for which plaintiff, Wellington Management Company, acts as principal underwriter. (Exhibit 3).

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*This Exhibit and all other Exhibits herein referred to are annexed to the Affidavit of James F. Fitzpatrick, filed in support of plaintiffs' motion for summary judgment in this action.

10. Since the passage of the Investment Company Act of 1940, the mutual fund business has enjoyed a period of substantial growth and active competition. During that period, the number of mutual fund members of the Institute has grown from 68 to 177, as of October 1, 1966; the number of shareholder accounts in mutual funds has grown from about 296,000 to 7,500,000; and the total investment by the public in such funds has grown from approximately $448,000,000 to $32,000,000,000. A broad variety of investment plans are available to the investing public, and the many mutual funds operating throughout the country are in vigorous competition. As of October 1, 1966, it is estimated that at least 1 million or about 25 percent, of the estimated 4 million mutual fund shareholders had holdings of $10,000 or more.

11. Prior to 1962, the statutory authority to regulate the fiduciary activities of national banks was vested in the Federal Reserve Board. Under its regulations and rulings, national banks were not permitted to operate a commingled fund as a general investment median. In September 1962, authority to regulate fiduciary activities was shifted to the Comptroller of the Currency, 76 Stat. 668, 12 U.S.C. § 92a. Shortly thereafter, the Comptroller issued a notice of proposed rule-making, concerning the promulgation of regulations which would permit banks to maintain collective investment funds as investment media and to offer shares in such funds to the public. In response to the Comptroller's invitation, the Institute submitted a statement opposing these regulations. On April 5, 1963, the Comptroller issued revised Regulation 9 effecting the proposed change. The regulation was amended by the Comptroller on January 31, 1964. 12 C.F.R. § 9.18.

12. On May 10, 1965, the Comptroller approved the plan submitted by First National City Bank of New York ("First National City") for the establishment and operation of a collective investment fund, called the Commingled Investment Account, under Regulation 9. On August 25,

1965, the Comptroller issued a statement that Regulation 9 would be amended to provide general authorization for other banks to establish funds similar to the fund created by First National City. At the time of the approval of First National City's plan, and to date, no state bank subject to the laws of the state of New York has operated a collective investment fund as a general investment medium.

13. On April 20, 1966, First National City registered its Commingled Investment Account with the Securities and Exchange Commission pursuant to the Investment Company Act as an open-end management investment company. On the same date, First National City filed a registration statement with the Securities and Exchange Commission pursuant to the Securities Act of 1933 for the purpose of registering the securities to be issued by its Commingled Investment Account. The registration statement concerning those securities became effective on June 14, 1966. Since then First National City has offered and sold to the investing public the securities issued by the Commingled Investment Account by means of the prospectus for First National City's Commingled Investment Account, dated June 14, 1966. (Exhibit 12).

14. By his promulgation of Regulation 9 and his approval of the plan submitted by First National City for its Commingled Investment Account, the Comptroller has authorized national banks to enter the securities business in direct unlawful competition with the mutual fund members of the Institute and in direct unlawful competition with their investment advisers and principal underwriters.

15. The Glass-Steagall Act of 1933 contained a number of provisions designed to separate commercial banking from the securities business, Ch. 89, 48 Stat. 162 (1933). The Federal Reserve Board has statutory authority to administer Section 32 of the Glass-Steagall Act, 48 Stat. 194 (1933), as amended, 49 Stat. 709 (1935), 12 U.S.C. § 78 (1964), which prohibits an officer, director, or employee of a national bank or other bank which is a member of the Federal

Reserve System from serving in a similar capacity in a company primarily engaged, among other things, in issuing stocks, bonds, or similar securities. The Federal Reserve Board has ruled on a number of occasions that mutual funds are primarily engaged in issuing securities within the meaning of Section 32 of the Glass-Steagall Act. Accordingly, the Board has on several occasions rejected requests by the Institute and by some mutual funds that bank officers or directors be permitted to serve on the board of directors of mutual funds.

16. The Bank-sponsored collective investment funds, which are permitted under Comptroller's Regulation 9, are virtually identical in function and structure to mutual funds. The SEC has recognized this and has insisted that all bank mutual funds must be registered under the Investment Company Act and that all participations in such funds must be registered as securities under the Securities Act of 1933. The Comptroller has sanctioned and encouraged such funds and such securities to be so registered with the Securities and Exchange Commission.

17. The collective investment funds authorized by Regulation 9, and exemplified by First National City's Commingled Investment Account, are identical to existing mutual funds in the following respects, among others: they are registered as open-end management investment companies with the Securities and Exchange Commission under the Investment Company Act; participations in them are registered as securities under the Securities Act of 1933; they are in the business of continuously issuing such securities; the proceeds of the sale of such securities are brought together and invested in the portfolio of securities owned by the fund.

18. The rights acquired by an investor in a bank-sponsored collective investment fund such as First National City's Commingled Investment Account are identical to the rights of an investor in a mutual fund in the following respects: the investor has an undivided interest in the fund's

portfolio of securities; the investor has the right to redeem his securities in the fund at any time, *i.e.*, to withdraw his share of the undivided assets in the fund in cash based on net asset values; investors annually elect a board of directors to oversee the affairs of the fund and, specifically, to decide whether the contract of the investment adviser should be renewed.

19. The potential customers who will be offered participations in a Bank-sponsored collective investment fund, including the potential investors in First National City's fund, are all potential customers for shares in the mutual funds issued by the mutual fund members and sold by the principal underwriter members, of the plaintiff Institute.

20. The large-scale entry of banks into the mutual fund business would have an adverse effect on what is now an efficient and highly competitive industry. Total sales volume for the year 1965 for all Institute members was approximately $4.4 billion. The distribution of these sales was such that no single mutual fund member of the Institute sold as much as 9 percent of the total. In New York State during the same year, Institute members sold approximately $567 million of mutual fund shares.

21. On information and belief, First National City has approximately 160 branches in New York City and the surrounding areas in New York State. Each such branch is an outlet for the securities issued by the Bank's Commingled Investment Account. Virtually every branch bank officer will be, in effect, a mutual fund salesman.

22. On information and belief, First National City is soliciting sales of participations in its Commingled Investment Account in New York State and elsewhere, in competition with members of the Institute, by mailing the Prospectus for its Commingled Investment Account (Exhibit 12) with a solicitation letter (Exhibit 14) to its customers.

23. Despite the prohibition contained in the Glass-Steagall Act of 1933, 48 Stat. 162, as amended, codified

in 12 U.S.C., other large banks in New York City and elsewhere will inevitably enter the mutual fund business, following the lead of First National City, unless the relief requested by plaintiffs is granted.

24. Institute members, in their attempts to sell the shares issued by the mutual fund members of the Institute, will be faced with increasing direct and unlawful competition from banks—competition which cannot fairly be met in the market-place since banks are in a position to use lists of their depositors and other customers to solicit sales. Such depositors and customers will daily be present in large numbers on the bank's premises to conduct banking business. Entry by banks into the mutual fund industry will, I believe, create unlawful competition and will result in substantial economic injury to the lawful business of the members of the Institute.

/s/ Robert L. Augenblick

[Jurat Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

AFFIDAVIT OF JOHN R. HAIRE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed November 30, 1966)

STATE OF NEW JERSEY
SS:
COUNTY OF UNION

JOHN R. HAIRE, being first duly sworn, deposes and says as follows:

1. I am a director of Investors Management Company, Inc., and a director of Hugh W. Long and Company, Inc.,

both plaintiffs in this action. I submit this affidavit in support of plaintiffs' motion for summary judgment herein.

2. Plaintiff Investors Management Company is incorporated under the laws of the State of New Jersey and has its office and principal place of business at Elizabeth, New Jersey. Plaintiff Hugh W. Long & Company is incorporated under the laws of the State of Nevada and has its office and principal place of business at Elizabeth, New Jersey. Pursuant to the requirements of Section 15 of the Investment Company Act of 1940, 15 U.S.C. § 80a-15, Investors Management Company acts as investment adviser, and Hugh W. Long & Company acts as principal underwriter, to the following open-end investment companies (hereinafter called "mutual funds"): Fundamental Investors, Inc.; Diversified Investment Fund, Inc.; and Diversified Growth Stock Fund, Inc. Investors Management Company, Hugh W. Long & Company, and each of the said mutual funds are members of the plaintiff Investment Company Institute.

3. Each of the said mutual funds is engaged in the business of continuously issuing and offering to the public redeemable securities which represent an undivided interest in the portfolio of securities owned by the fund. The activities of these funds are conducted, and their relationships to their principal underwriter and investment adviser are established, pursuant to the requirements of the Investment Company Act of 1940 under the jurisdiction of the Securities and Exchange Commission.

4. There are more than 250,000 investors in the said mutual funds. Securities of each fund are offered for sale and sold throughout the nation by independent broker-dealers who purchase such shares from Hugh W. Long and Company as principal underwriter. As of June 30, 1966, the total assets of the three funds were approximately $1,-510,000,000. During the first nine months of 1965, about 77.4 percent of the dollar volume of new sales were in amounts of $10,000 or more.

5. In 1965, shares of these three mutual funds having a total combined value of approximately $15,486,000 were sold in New York State. During the first six months of 1966, such total sales were approximately $8,900,000 in New York State.

6. As is set forth in detail in the Affidavit of Robert L. Augenblick, filed simultaneously herewith, the bank-operated collective investment funds authorized by Regulation 9 of the Comptroller of the Currency, and exemplified by the Collective Investment Account of First National City Bank of New York, are virtually identical in function and structure to mutual funds of the type which Investors Management Company and Hugh W. Long & Company serve. By permitting national banks to establish and operate such funds, and permitting such banks and their employees to offer and sell the securities issued by them, the Comptroller has permitted banks to enter the securities business in direct, unlawful competition with existing mutual funds and their investment advisers and principal underwriters, including Investors Management Company, Hugh W. Long & Company, and the mutual funds they serve. Moreover, by authorizing First National City Bank of New York to create its Collective Investment Account, and to offer and sell securities issued by such Account in the City and State of New York, the Comptroller has permitted that Bank and its Account to engage in direct, unlawful competition in that City and State with Investors Management Company, Hugh W. Long & Company, and the mutual funds they serve. The direct, unlawful competition authorized by the Comptroller's regulations and subsequent rulings will adversely affect the business of Investors Management Company, and Hugh W. Long & Company, in the City and State of New York and throughout the country.

/s/ John R. Haire

[Jurat Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

AFFIDAVIT OF JOSEPH E. WELCH IN
SUPPORT OF PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT

(Filed November 30, 1966)

STATE OF PENNSYLVANIA
SS:
COUNTY OF PHILADELPHIA

JOSEPH E. WELCH, being first duly sworn, deposes and says as follows:

1. I am President of Wellington Management Company, a plaintiff in this action. On October 31, 1966 Wellington Company, Inc., which was also a plaintiff in this Action, was merged into Wellington Management Company. I submit this affidavit in support of plaintiffs' motion for summary judgment herein.

2. Plaintiff Wellington Management Company is incorporated under the laws of the State of Delaware and has its office and principal place of business at Philadelphia, Pennsylvania. Pursuant to the requirements of Section 15 of the Investment Company Act of 1940, 54 Stat. 812, 15 U.S.C. Sec. 80a-15, Wellington Management Company acts as investment adviser and principal underwriter, to the following open-end investment companies (hereinafter called "mutual funds"): Wellington Fund, Inc. and Windsor Fund, Wellington Management Company and each of the said Mutual funds are members of the plaintiff Investment Company Institute.

3. Each of the said mutual funds is engaged in the business of continuously issuing and offering to the public redeemable securities which represent an undivided interest in the portfolio of securities owned by the fund. The activities of these funds are conducted, and their relationships to their principal underwriter and investment adviser are

established, pursuant to the requirements of the Investment Company Act of 1940 under the jurisdiction of the Securities and Exchange Commission.

4. There are more than 375,000 investors, residing throughout the United States, in the said mutual funds. Securities of each fund are offered for sale and sold throughout the nation. As of June 30, 1966, the total assets of the two mutual funds were approximately $2,017,000,000. During February, 1966, about 56.5 percent of the dollar volume of new sales were in amounts of $10,000 or more.

5. In 1965, shares of the said mutual funds having a total combined value of approximately $24,990,000 were sold in New York State. During the first six months of 1966, such total sales were approximately $8,691,000 in New York State.

6. As is set forth in detail in the Affidavit of Robert L. Augenblick, filed simultaneously herewith, the bank-operated collective investment funds authorized by Regulation 9 of the Comptroller of the Currency, and exemplified by the Collective Investment Account of First National City Bank of New York, are virtually identical in function and structure to the Wellington Fund and Windsor Fund. By permitting national banks to establish and operate such funds and permitting such banks and their employees to offer and sell the securities issued by them, the Comptroller has permitted banks to enter the securities business in direct unlawful competition with existing mutual funds and their investment advisers and principal underwriters, including Wellington Management Company, and the mutual funds it serves. Moreover, by authorizing First National City Bank of New York to create its Collective Investment Account, and to offer and sell securities issued by such Account in the City and State of New York, the Comptroller has permitted that Bank and its Account to engage in direct unlawful competition in that City and State with Wellington Management Company and the mutual funds it serves. The direct unlawful competition authorized by the Comptroller's regulations and his subsequent rulings will adversely affect the

business of Wellington Management Company in the City and State of New York and throughout the country.

/s/ Joseph E. Welch

[Jurat Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

AFFIDAVIT OF STUART F. SILLOWAY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed November 30, 1966)

STATE OF MINNESOTA
SS:
COUNTY OF HENNEPIN

STUART F. SILLOWAY, being first duly sworn, deposes and says as follows:

1. I am President and a director of Investors Diversified Services, Inc. ("IDS"), a plaintiff in this action. I submit this affidavit in support of plaintiffs' motion for summary judgment herein.

2. IDS is incorporated under the laws of the State of Minnesota and has its office and principal place of business at Minneapolis, Minnesota. It acts as investment adviser and principal underwriter, pursuant to the requirements of Section 15 of the Investment Company Act of 1940, 15 U.S.C. § 80a-15, to the following open-end investment companies (hereinafter called "mutual funds"): Investors Mutual, Inc; Investors Stock Fund, Inc.; Investors Variable Payment Fund, Inc.; and Investors Selective Fund, Inc. IDS and each of the said mutual funds are members of the plaintiff Investment Company Institute.

3. Each of the said mutual funds is engaged in the business of continuously issuing and offering to the public redeemable securities which represent an undivided interest in the portfolio of securities owned by the fund. The activities of these mutual funds are conducted, and their relationships to IDS as principal underwriter and investment adviser are established, pursuant to the requirements of the Investment Company Act under the jurisdiction of the Securities and Exchange Commission.

4. There are more than three-quarter million investors, residing throughout the United States, in the mutual funds served by IDS. Securities of each fund are offered for sale and sold throughout the nation. As of June 30, 1966, the total assets of the four mutual funds were approximately $5,173,000,000. During 1965 about 46.3 percent of the dollar volume from new customers were in amounts of $10,000 or more.

5. In 1965, shares of the four mutual funds served by IDS having a total combined value of approximately $24,-187,000 were sold by IDS in New York State. During the first six months of 1966, such sales totaled approximately $18,218,000 in New York State.

6. As is set forth in detail in the Affidavit of Robert L. Augenblick, filed simultaneously herewith, the bank-operated collective investment funds authorized by Regulation 9 of the Comptroller of the Currency, and exemplified by the Collective Investment Account of First National City Bank of New York, are virtually identical in function and structure to mutual funds of the type which IDS serves and the shares of which IDS sells. By permitting national banks to establish and operate such funds, and permitting such banks and their employees to offer and sell the securities issued by them, the Comptroller has permitted banks to enter the securities business in direct unlawful competition with existing mutual funds and their investment advisers and principal underwriters, including IDS and the four mutual funds it serves. Furthermore, by specifically authorizing

First National City Bank of New York to establish and operate its Collective Investment Account and to offer and sell securities issued by such Account in the City and State of New York, the Comptroller has permitted that Bank to engage in direct unlawful competition in that City and State with IDS and the four mutual funds it serves. The direct unlawful competition authorized by the challenged regulation and subsequent actions of the Comptroller will adversely affect the sale by IDS of the shares issued by the four mutual funds it serves in the City and State of New York and throughout the country.

/s/ Stuart F. Silloway

[Jurat Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

AFFIDAVIT OF ADRON P. TRANTUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed November 30, 1966)

STATE OF NEW JERSEY
SS:
COUNTY OF UNION

ADRON P. TRANTUM, being first duly sworn, deposes and says as follows:

1. I am Senior Vice President of Investors Management Company, Inc., a plaintiff in the above-entitled action. I submit this affidavit in support of plaintiffs' motion for summary judgment herein.

2. Investors Management Company throughout its history has had several changes in its corporate name and has been reincorporated on several occasions. I have been employed

by the company under its various names since September 18, 1929.

3. On June 16, 1934, the date on which the provisions fo the Glass-Steagall Act, 48 Stat. 184, 12 U.S.C. § 78, became effective, plaintiff Investors Management Company, Inc. was named Irving Investors Management Company, Inc., and was a wholly-owned subsidiary of Irving Trust Company, a bank chartered by the State of New York and a member of the Federal Reserve System. Irving Investors Management Company was then engaged in the business of providing services to investment companies. Among its activities, it served as underwriter and investment adviser to Irving Investors Fund C, Inc.

4. Irving Investors Fund C, Inc. was a corporation of a type similar to that generally classified today as an open-end investment company or mutual fund. It issued to investors shares representing an undivided interest in a pool of securities. The investor could redeem such shares at any time based on the net asset value of his shares at the time of redemption. A substantial number of the shares in this fund had been offered and sold to the customers of Irving Trust Company by the bank and its officers.

5. In October, 1934, Irving Trust Company divested itself of the capital stock of its wholly-owned subsidiary, Irving Investors Management Company, and thereby also disposed of its entire interest in Irving Investors Fund C. Thereafter, Irving Trust Company had no further connection with the distribution of the shares of that fund or with the management thereof. In a letter dated October 5, 1934, Robert C. Effinger, President of Irving Investors Management Company, announced to the participants in several funds, including Irving Investors Fund C, that this decision of Irving Trust Company had been made "(i)n consequence of certain provisions of the Banking Act of 1933 and recent rulings of the Federal Reserve Board made pursuant thereto . . ." A true copy of said letter is attached hereto as Appendix A.

6. After divestiture by Irving Trust Company, the corporate name of Irving Investors Management Company, Inc. was changed on several occasions and the company was reincorporated several times. Its present name is Investors Management Company, Inc., and it is now incorporated under the laws of the State of New Jersey.

7. On December 17, 1934, the name of Irving Investors Fund C, Inc. was changed to Investors Fund C, Inc. In 1954 Investors Fund C, Inc. was merged into Fundamental Investors, Inc., one of the mutual funds for which Investors Management Company, Inc. now serves as investment adviser.

/s/ Adron P. Trantum

[Jurat Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

AFFIDAVIT OF JAMES F. FITZPATRICK IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed November 30, 1966)

THE DISTRICT OF COLUMBIA SS:

JAMES F. FITZPATRICK, being first duly sworn, deposes and says as follows:

That annexed to this affidavit are true and correct copies of the following documents:

Exhibit 1. Prospectus for Investors Mutual, Inc., dated January 5, 1966.

Exhibit 2. Prospectus for Fundamental Investors, Inc., dated April 1, 1966.

Exhibit 3. Prospectus for Wellington Fund, Inc., dated April 1, 1966, supplemented November 1, 1966.

Exhibit 4. Statement of the Comptroller of the Currency, dated August 25, 1965.

Exhibit 5. Notification of Registration filed by Commingled Investment Account of First National City Bank with the Securities and Exchange Commission pursuant to the Investment Company Act of 1940, including Exhibit No. 1 thereto.

Exhibit 6. Registration Statement of Commingled Investment Account of First National City Bank (Form N-8B-1), filed with the Securities and Exchange Commission April 20, 1966, which incorporated exhibits, including the documents designated Exhibits 7, 8, 9, and 10, described immediately hereafter.

Exhibit 7. Specimen of Participant's Certificate issued upon admission to First National City's Account (filed as Exhibit 4(a) to the Account's Registration Statement under the Investment Company Act and as Exhibit C-1 to the Account's Registration Statement under the Securities Act of 1933, Form S-5).

Exhibit 8. Specimen of Participant's Certificate upon partial termination of participation in First National City's Account (filed as Exhibit 4(b) to the Account's Registration Statement under the Investment Company Act and as Exhibit C-2 to the Account's Registration Statement under the Securities Act of 1933, Form S-5).

Exhibit 9. Management agreement between the Account and First National City Bank (filed as Exhibit 5 to Account's Registration Statement under the Investment Company Act and as Exhibit D to the Account's Registration Statement under the Securities Act of 1933, Form S-5).

Exhibit 10. Underwriting agreement between Account and First National City Bank (filed as Exhibit 6 of the Account's Registration Statement under the Investment Company Act and as Exhibit E to the Account's Registration Statement under the Securities Act of 1933, Form S-5).

Exhibit 11. Amendment No. 1 to Registration Statement, under the Investment Company Act, of Commingled Investment Account of First National City Bank, filed May 23, 1966.

Exhibit 12. Prospectus for Commingled Investment Account of First National City Bank, dated June 14, 1966.

Exhibit 13. Notice of Annual Meeting of Participants and Proxy Statement for Commingled Investment Account of First National City Bank, dated October 14, 1966.

Exhibit 14. Solicitation letter of First National City Bank for participation in Commingled Investment Account undated.

/s/ James F. Fitzpatrick

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[Exhibit 1 to Affidavit of James F. Fitzpatrick Civ. Act. No. 1083-66 United States District Court for the District of Columbia]

FILED
NOV 30 1966
ROBERT M. STEARNS, CLERK

PROSPECTUS / January 5, 1966

Investors Mutual, Inc. is a mutual investment fund, with net assets now in excess of $2,900,000,000, invested in a prudently selected, diversified portfolio of securities, balanced among bonds, common stocks and preferred stocks.

Shares of the Company are distributed by Investors Diversified Services, Inc., organizer and investment manager of the Company. This firm, founded in 1894, now manages over $5,500,000,000 in market value of investment securities for investment companies whose securities are held by more than 900,000 investors.

The shares are offered to the public at their net asset value, ordinarily determined daily, plus a maximum sales charge of 8% of the public offering price. The sales charge is reduced on a graduated scale for sales involving large amounts as more fully described in numbered section 14 of this prospectus. Asset value varies with the fluctuations in the market value of the securities owned by the Company.

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

SERIES AA

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Investors Mutual, Inc. does not authorize or assume responsibility for any information or representations regarding Investors Mutual, Inc. other than those contained in this prospectus, or in any supplement thereto, or in any supplemental sales material authorized by the Company for use in connection with the sale of its stock.

INVESTORS MUTUAL, INC.

MINNEAPOLIS MINNESOTA

About the Prospectus

This Prospectus has been prepared to give you the material facts about Investors Mutual, Inc., so that you can intelligently decide whether or not an investment in this Company is the kind which will best fit your investment needs.

In these pages you will find facts and figures concerning the Company; its operating results; its investment restrictions and policies; and the rights and privileges of its shareholders. *WE URGE YOU TO READ IT CAREFULLY.*

1 Investors Mutual—What Is It?

Investors Mutual, Inc. is a company which invests its money primarily in the securities of American enterprises. In other words, it is an investment company or, as it is sometimes known in investment terms, a "mutual fund." Its purpose is to provide persons having varying amounts of money to invest, with a way to combine their investment funds and, through the medium of one security, share in the business of a large number of companies within different industries.

Because it invests not only in the common stock of such companies but also in preferred stocks and bonds, it is known as a "balanced mutual fund."

These investments are *not* fixed. As explained later, they are chosen, supervised and changed on the recommendation of Investors Diversified Services, Inc. This company is, by contract, the investment manager of the fund.

2 Investment Management

Investors Diversified Services, Inc., the Fund's organizer, sponsor and investment manager, was established in 1894. It manages investments for five open-end investment companies, for its own account, and for the accounts of its subsidiary companies. It has a large staff of investment specialists with many years of experience in investment management. It maintains extensive facilities for financial and economic research and analysis. Analysts trained in specialized fields (such as public utilities, railroads, oils, chemicals, etc.) are continually studying and evaluating the companies in which investments are made or contemplated. Visits to production and operating centers of these companies and "on the spot" talks with their managers are part of the system upon which the analysts base their reports and recommendations.

Shareholders of Investors Mutual, Inc. have the benefit of these comprehensive management services. Whether a person has enough money to buy a few or many securities, he very probably does not have

the time, experience and knowledge necessary to decide properly which securities are best to buy, when to buy or sell them, and at what prices. Seasoned investment management helps to solve this perplexing problem by supplying the services of an organization of trained and skilled specialists who make investments their life work and devote full time to dealing with the many aspects involved in the investment of money. By pooling the funds of many thousands of investors throughout the nation, the Company is able to provide the average investor, on a reasonable basis, with services and facilities which at one time only wealthy investors and large estates could afford. These services are paid for by a management fee to Investors Diversified Services, Inc. as set forth in section 18.

Allocation of Brokerage on Fund Portfolio Transactions

Investors Diversified Services, Inc., the Company's investment manager, now manages over $5,500,000,000 in market value of investment securities for the investment companies whose securities it distributes, including Investors Mutual, Inc. This large scale operation permits the investment manager, in connection with portfolio transactions of the fund companies handled through brokers, to obtain the maximum in the way of the services and facilities offered by leading investment brokerage houses. The investment manager normally places purchase and sale orders for most New York Stock Exchange common stocks through one member house (Scheffmeyer & Co.) which receives a fixed fee payable out of aggregate commissions. This firm distributes brokerage commissions to a large number of member firms (currently around 50 firms), in a fashion designed to obtain the best price and execution, as directed by the investment manager in a manner which seeks to give recognition to those member firms which are capable of rendering services and which, over time, do provide services to the investment manager over and above the bare brokerage function although this is not an absolute standard since some business may be distributed solely on the basis of the best business judgment of the investment manag The distribution of such brokerage business is det mined from time to time by the investment manag and reviewed by the Board of Directors of the Fu The distribution is made with a view to obtain the maximum usefulness from the firms handli portfolio transactions. Such services may be in ter of contributions made by such firms' research st in supplementing, aiding, or otherwise helping the m search activities of the investment manager, referra of direct placements, wire services, quotations, st tistical and economic data and reports, and other se vices which large brokerage houses can and do rend to important buyers and sellers of securities witho extra charge. The only compensation paid these bro ers is the prescribed brokerage commissions for s such stock exchange transactions which would have be paid by the funds in any event. Brokerage comm sions paid by the Fund totaled $2,319,940 for t fiscal year ended September 30, 1965.

The Fund's investment manager has organized subsidiary corporation, IDS Securities Corporat ("IDSS") for the purpose of engaging in the brok age business. Effective August 31, 1965 IDSS w admitted as a member firm of the Pacific Coast Sto Exchange. As a member of that exchange, IDSS re ceives brokerage from transactions executed on t exchange. Use of the services of IDSS by the Fu must be consistent with the objective of obtain best price and execution. The Fund's investment ma ager has confirmed to the Fund that an amount eq to any net profit which IDSS may realize from tra actions attributable to the Fund from all sources w be credited to the Fund, not less often than annual as a reduction of the amounts otherwise due to In vestors Diversified Services, Inc. under the investm advisory and services agreement between it and t Fund. A net profit of $55,053 attributable to trans tions of the Fund was realized during the three mo ended November 30, 1965. No representation is ma that any future benefit which may accrue to the Fu from such reduction will be significant from the st point of any individual Fund investor.

3 Condensed Financial Information

PER SHARE INCOME AND CAPITAL CHANGES
(for a share outstanding throughout the years)

(Adjusted for 2-for-1 stock split on April 26, 1956)

Fiscal years ended September 30	1956	1957	1958	1959	1960	1961	1962	1963	1964	1965
Income and Expense										
Income	$.40¾	$.41	$.41¾	$.41	$.42¼	$.43	$.44½	$.44¼	$.45¾	$.47½
Operating expenses	.05	.04¾	.04¾	.05½	.05¼	.06	.06	.05½	.05⅛	.04⅜
Net income	.35¾	.36¼	.37	.35½	.37	.37	.38½	.38¾	.40⅜	.42⅜
Dividends from net income	.35¾	.36½	.36½	.35½	.36¾	.37¼	.38¼	.39	.40⅜	.42⅜
Capital Changes										
Net asset value at beginning of period	$9.08	$9.11	$8.55	$9.72	$10.18	$10.00	$11.58	$9.95	$11.35	$12.22
Net realized and unrealized profits (or losses) on securities	.18½	(.48)	1.28¾	.68¾	(.10½)	1.74¾	(1.28¼)	1.60¼	1.11⅛	.32¾
Distributions from realized capital gains	.15½	.07¾	.12¼	.22¾	.07¾	.16½	.35	.20	.24⅛	.28¾
Net asset value at end of period	9.11	8.55	9.72	10.18	10.00	11.58	9.95	11.35	12.22	12.26
Ratio of operating expenses to average net assets	0.54%	0.54%	0.54%	0.53%	0.53%	0.54%	0.52%	0.50%	0.44%	0.38%
Ratio of net income to average net assets	3.87%	4.03%	4.13%	3.40%	3.62%	3.34%	3.45%	3.53%	3.44%	3.50%
Number of shares outstanding at end of period (000 omitted)	104,715	116,590	125,301	138,565	150,448	159,255	172,740	191,987	214,535	239,927

4 Investment Objectives and Policies

Objectives sought by the Company are: (1) to provide a reasonable return on its shareholders' investments; (2) to preserve the value of these investments; (3) to aim at long-term appreciation possibilities on an investment rather than a speculative basis.

Because virtually all securities fluctuate in market price and corporate earnings and dividends vary from year to year, it is impossible for the Company to assure its shareholders that these objectives can be realized at all times. However, to attain them, the management exerts every effort to maintain a *balanced portfolio* by varying the proportions of bonds, preferred stocks and common stocks which are appraised in the light of security values and long-term economic trends. Under certain conditions a major portion of the Company's assets may be invested in equity securities such as common stocks. And there may be times when the Company will assume a defensive position by investing a large part in securities such as fixed interest-bearing bonds and preferred stocks with established dividend rates. The present intention of the management is that generally the Company will have not more than 75% of its investments in common stocks and not less than 25% in bonds, preferred stocks and short term notes.

At September 30, 1965, investments, taken at market value, were distributed as follows: short term notes 2.30%, bonds 27.19%, preferred stocks 6.70% and common stocks 63.81%.

Investments are not concentrated in any one in-

dustry or group of industries but are varied according to what is judged advantageous under different economic conditions. The portfolio is *diversified* by investments in a cross section of business and industry and frequently numerous companies within an industry, in an effort to reflect a representative pattern of American enterprise. Thus this "balance" of investments, plus the broad diversification, tends to reduce the risk of market fluctuation and to provide a reasonably reliable source of income for shareholders. The Company does not intend to act as underwriter, invest in real estate, purchase and sell commodities or commodity contracts, make loans to other persons (except by the purchase and sale of securities), invest in companies for the purpose of exercising control or management, or borrow money except for extraordinary or emergency purposes. The policies stated in this last sentence may not be changed without a vote of the shareholders. It plans to select securities for its investment portfolio which in the opinion of the management may profitably be retained on a long-term basis. However, in order to preserve the full benefit of managerial judgment, the Company reserves freedom of action with respect to portfolio turnover and may sell any security regardless of the length of time it may have been held. The Company does not engage in short term trading as such.

5 Dividends and Capital Gains Distributions

The Company was organized in January, 1940 and since December 31st of that year it has paid a quarterly dividend to its shareholders. On September 29, 1965 the Company declared its 100th consecutive quarterly dividend. Its income has varied in amount and as a result the amount of dividends paid to its shareholders has varied. See section 3.

The Company presently intends to continue its policy of distributing, as dividends to shareholders in each year, substantially all of its investment income less operating expenses. Dividend checks are ordinarily mailed to reach shareholders about the 14th of January, April, July and October. These dividends are payable to shareholders of record on or about the last business day of the previous month. The fiscal year-end dividend will be augmented by distributions from realized capital gains when available.

A regulated investment company which meets certain diversification of assets and source of income requirements (prescribed by the internal revenue code) is accorded conduit or "pass through" treatment if it distributes to its shareholders at least 90 per cent of its taxable income (exclusive of net long-term capital gain); i.e., it will be taxed only on the portion of such income which is retained. A shareholder receiving a distribution of such income from a regulated investment company treats it as a receipt of ordinary income in the computation of his gross income for federal tax purposes and not a shareholder is eligible to include it in computing the dividend received exclusion and the intercorporate dividend deduction.

As to capital gains distributions, to the extent that a regulated investment company distributes the excess of net long-term capital gain over its net short term capital loss, such capital gain is not taxable to the company but is taxable to the shareholder as a long-term capital gain. Such capital gains distributions do not qualify for the computation of the dividend received exclusion or the intercorporate dividend deduction.

Approximately 24% of the net asset value of the shares of Investors Mutual, Inc., as of September 30, 1965 represents unrealized appreciation. Net gain on the sale of securities when realized and distributed (actually or constructively) is taxable for federal income tax purposes as capital gain. If the net asset value of shares were reduced below a shareholder's cost by such a distribution it would be a return of investment though taxable as stated above.

6 Features of the Investment

(a) NATURE OF INVESTMENT

Investors Mutual, Inc. is a mutual, open-end, diversified, management investment company owned by its shareholders. Each share represents a pro-rata interest in the assets of the Company. The Company has only one class of stock. All shares are transferable, have equal rights and are redeemable as explained in section 16. As of September 30, 1965, there were 239,926,645 shares outstanding owned by 429,985 shareholders.

(b) DIVERSIFICATION

Diversification is considered a basic virtue of an investment company because it tends to reduce inherent market risks by spreading investments among many carefully selected securities. In operating the Company as a "balanced" fund, and in line with its current appraisals of economic conditions, the management intends to invest its assets in varied proportions of bonds, preferred stocks and common stocks, with not more than 75% in common stocks.

Within such general classification of types of securities, the Company intends to diversify its investments in the following manner:

(1) Diversification as to types of enterprises.

(2) Diversification as to individual companies within these enterprises.

(3) Geographical diversification.

The list of investments starting on page 29 illustrates how this policy of diversification is currently applied by the Company.

(c) FLUCTUATION OF ASSET VALUE

The asset value of the shares varies with the daily market value of the securities owned by the Company and may be more or less than the investor's cost. As explained in sections 14 and 16, the shares are ordinarily redeemable at asset value, and are sold at asset value plus a maximum distribution charge of 8% of offering price.

7 Privileges Extended to Shareholders

(a) DIVIDENDS AND CAPITAL GAINS REINVESTED

The Company at the present time offers its shareholders the privilege of reinvesting the dividends or capital gains distributions they receive on their shares in additional shares of the Company, without paying another sales charge. See section 9.

(b) MARKETABILITY

Under ordinary circumstances, shares may be redeemed for cash at any time. Any shareholder may turn in his shares to the Company and receive the asset value per share (which may be more or less than his cost) calculated at the close of business on the first full business day upon which the Company receives the holder's endorsed stock certificate and written request for redemption of his shares. This privilege (and certain limitations thereon) is more fully explained in section 16.

(c) INVESTMENTS IN FUNDS INTERCHANGEABLE

Perhaps sometime in the future a shareholder may want to change his investment in Investors Mutual, Inc. to shares in another type of fund. Under the present policy of the Company, as discussed later in section 12, he is privileged to transfer his investment at net asset value to investments in shares of Investors Stock Fund, Inc., Investors Selective Fund, Inc. or Investors Variable Payment Fund, Inc., and he does not have to pay a sales charge for this service.

8 Systematic Investment Plan

Provision is made for a simple means of accumulating shares systematically through the Company's "Systematic Investment Plan." Under this plan, the investor makes an initial cash investment, followed at regular intervals by further payments in convenient amounts. With each additional payment, additional shares, the number of which is determined by the then public offering price, are purchased for his account. The investor may decide whether to make these purchases monthly, quarterly or at any other stated interval and may discontinue payments at any time without penalty. All dividends and capital gains distributions received on shares may be reinvested without sales charge towards the accumulation of more shares (see section 9). The Fund reserves the right to discontinue or alter the plan at any time.

This plan of purchase is simply a designation by the applicant of the times at which he intends to make further investments in shares of Investors Mutual, Inc. He is not obligated or required to make any single purchase pursuant to his expressed intention. By adopting a plan, however, he establishes for himself a program by which he proposes to acquire at stated intervals as many shares of the Fund as each payment when made will then purchase at the then public offering price.

The plan contemplates the regular investment at fixed periods of an equal number of dollars in the shares of the Fund. Since the shares fluctuate in value this investment of an equal number of dollars has the effect of causing the investor to buy more shares when prices are low and fewer shares when they are high. The investor will, of course, incur a loss if he discontinues his plan and redeems his shares when the market value of his shares is [illegible] than his cost thereof. Accordingly, in selecting [illegible] plan he should take into consideration his financial ability to continue the plan through periods of [illegible] security market price levels. He must also realize that the plan of itself does not assure a profit or protect against loss of value in declining markets.

The plan is not an option, warrant or right to purchase additional shares and each payment for investment under the declared plan is a separate application subject in each instance to acceptance or rejection by the issuer. As shares are acquired under the plan, the purchaser becomes entitled to all rights of a shareholder upon the shares he has purchased as of the date his original payment and each subsequent payment are received and accepted by the Company. As each payment is made and accepted the Company gives the shareholder the proper credit for all of his shares or fractional shares so acquired upon its books of record. No certificate will be issued until the registered shareholder asks for it or the Company at its own election issues a certificate. In either case, the Company may include in such certificate the entire number of shares owned by the shareholder. Shares purchased pursuant to the plan are identical with all other shares of the Company (whether or not a certificate has been issued for them) and have all rights, including dividend, liquidation and redemption rights. The shares are fully paid outstanding shares or fractional shares. All of any part of the shares acquired under the plan, whether or not a certificate has been issued therefor, may be redeemed at any time by the owner as explained in section 16.

9 Dividend Reinvestment Plan

Any shareholder may, by means of his written authorization, appoint Investors Diversified Services, Inc. (IDS) as his agent to receive cash dividends paid by the Company on his shares and to reinvest them for him in more shares of the Company at their asset value. No additional charge is made for this service. His authorization for this agency becomes effective as soon as it is received by IDS at its offices in Minneapolis, Minnesota. Only those dividends declared after receipt of this authorization will be reinvested. Distributions of securities profits may be reinvested separately at net asset value (see section 7(a)).

He may cancel his authorization at any time by notifying IDS, in writing, that he no longer wants it to act as his dividend reinvestment agent. Upon receipt of his letter, his agreement will be ended, unless the notice is received between a dividend record date and a dividend payment date. In that case, the termination will become effective immediately following the next dividend payment date after the notification is received. IDS reserves the right to terminate the agency at any time by written notice to the shareholder.

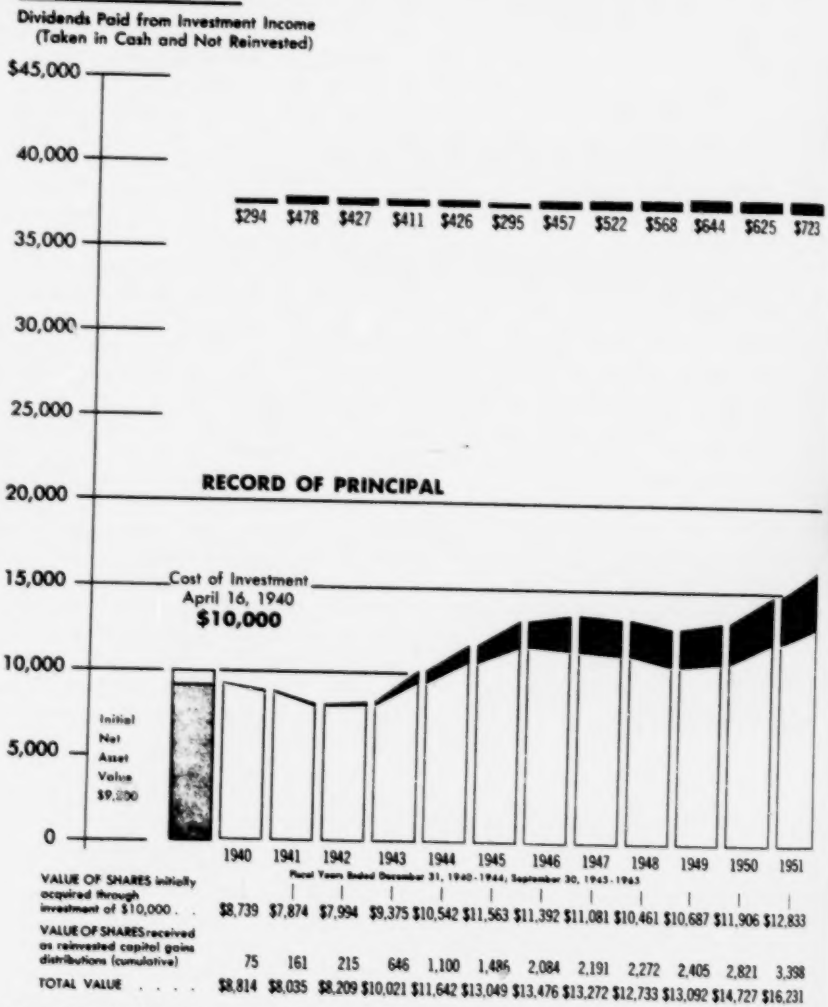
Any dividends or distributions received by an investor shortly after a purchase of shares by him will have the effect of reducing the net asset value of his shares by the amount of the dividends or distributions. Furthermore, such dividends or distributions, although in effect a return of capital, are subject to taxes.

10 Illustrations of Assumed Investment Programs

ILLUSTRATION OF AN ASSUMED INVESTMENT OF $10,000 IN INVESTORS MUTUAL, INC.

with Capital Gains Distributions Reinvested in Additional Shares

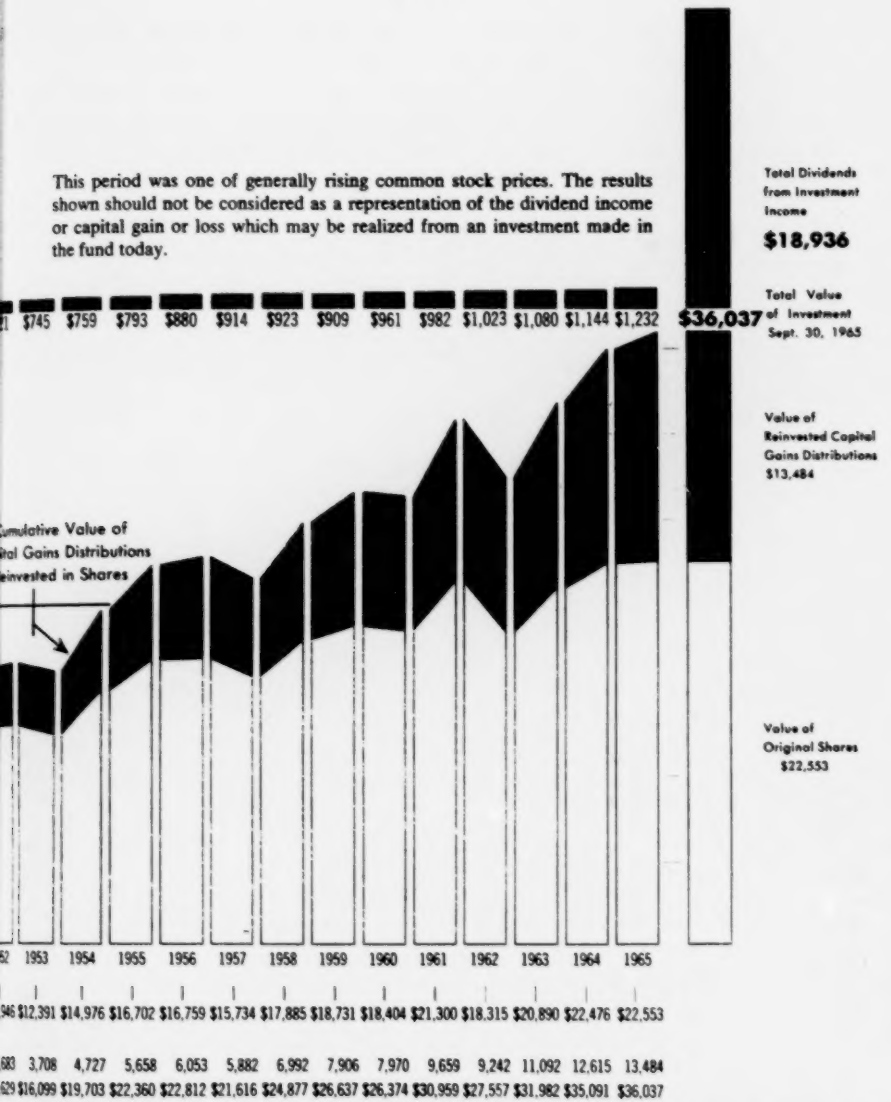
The chart below covers the period from April 16, 1940 (inception of the fund) to September 30, 1965.



Initial net asset value is the amount received by the fund after deducting from the cost of the investment the sales commission as described in the prospectus.

No adjustment has been made for any income taxes payable by stockholders on reinvested capital gains distributions. The dollar amounts of capital gains distributions reinvested in additional shares were: 1940—$74; 1941—$93; 1942—$51; 194

This period was one of generally rising common stock prices. The results shown should not be considered as a representation of the dividend income or capital gain or loss which may be realized from an investment made in the fund today.



—$402; 1944—$368; 1945—$276; 1946—$623; 1947—$163; 1948—$204; 1949—$84; 1950—$141; 1951—$358; 1952—$256; 1953—$183; 1954—$245; 1955—$387; 1956—$382; 1957—$194; 1958—$310; 1959—$582; 1960—$203; 1961—$435; 1962—$936; 1963—$554; 1964—$680; 1965—$826. Total $9,010. If capital gains distributions *had not been reinvested*, total dividends from investment income for the period would have been $14,500, total capital gains distribution $6,856, and total value of investment $22,553 at September 30, 1965.

ILLUSTRATION OF AN ASSUMED INVESTMENT OF $10,000 IN INVESTORS MUTUAL, INC.

with both Dividends from Investment Income and Capital Gains Distributions Reinvested in Shares

The table below covers the period from April 16, 1940 (inception of the fund) to September 30, 1965. This period was one of generally rising common stock prices. The results shown should not be considered as a representation of the dividend income or capital gain or loss which may be realized from an investment made in the fund today.

	COST OF SHARES			VALUE OF SHARES					NUMBER OF SHARES ACQ (To nearer full share one		
Fiscal Year End*	Amount of Dividends from Investment Income Reinvested Annually	Cumulative Cost of Shares Purchased through Reinvestment of Income Dividends	Total Cost Including Reinvested Income Dividends	(A) Initially Acquired	(B) Acquired through Reinvestment of Capital Gains Distributions (cumulative)	Sub-Total	(C) Purchased through Reinvestment of Income Dividends (cumulative)	Total Value	(A) Shares Initially Acquired	(B) Acquired through Reinvestment of Capital Gains Distributions (cumulative)	(C) Purchased through Reinvestment of Income Dividends (cumulative)
1940	$ 294	$ 294	$10,294	$ 8,739	$ 75	$ 8,814	$ 301	$ 9,115	1,840	16	63
1941	505	799	10,799	7,874	168	8,042	751	8,793	1,840	39	176
1942	477	1,276	11,276	7,994	229	8,223	1,253	9,476	1,840	53	288
1943	481	1,757	11,757	9,375	732	10,107	1,943	12,050	1,840	144	381
1944	520	2,277	12,277	10,542	1,282	11,824	2,720	14,544	1,840	224	475
1945	372	2,649	12,649	11,563	1,760	13,323	3,361	16,687	1,840	280	535
1946	591	3,240	13,240	11,392	2,545	13,937	3,848	17,785	1,840	411	621
1947	699	3,939	13,939	11,081	2,698	13,779	4,431	18,210	1,840	448	736
1948	792	4,731	14,731	10,461	2,835	13,296	4,950	18,246	1,840	499	870
1949	940	5,671	15,671	10,687	3,021	13,708	6,013	19,721	1,840	520	1,035
1950	958	6,629	16,629	11,906	3,585	15,491	7,680	23,171	1,840	554	1,187
1951	1,157	7,786	17,786	12,833	4,447	17,280	9,448	26,728	1,840	637	1,355
1952	1,207	8,993	18,993	12,946	4,920	17,866	10,728	28,594	1,840	699	1,525
1953	1,302	10,295	20,295	12,391	5,034	17,425	11,522	28,947	1,840	748	1,711
1954	1,386	11,681	21,681	14,976	6,538	21,514	15,369	36,883	1,840	803	1,888
1955	1,505	13,186	23,186	16,702	8,034	24,736	18,653	43,389	1,840	885	2,055
1956	1,733	14,919	24,919	16,759	8,812	25,571	20,394	45,965	1,840	968	2,239
1957	1,869	16,788	26,788	15,734	8,685	24,419	20,921	45,340	1,840	1,016	2,446
1958	1,966	18,754	28,754	17,885	10,534	28,419	25,873	54,292	1,840	1,084	2,662
1959	2,008	20,762	30,762	18,731	12,336	31,067	29,020	60,087	1,840	1,212	2,850
1960	2,198	22,960	32,960	18,404	12,590	30,994	30,657	61,651	1,840	1,259	3,065
1961	2,325	25,285	35,285	21,300	15,614	36,914	37,872	74,786	1,840	1,349	3,271
1962	2,502	27,787	37,787	18,315	15,745	34,060	34,862	68,922	1,840	1,582	3,502
1963	2,737	30,524	40,524	20,890	19,373	40,263	42,548	82,811	1,840	1,706	3,748
1964	3,002	33,526	43,526	22,476	22,649	45,125	48,832	93,957	1,840	1,854	3,998
1965	3,341	36,867	46,867	22,553	24,996	47,549	52,348	99,897	1,840	2,039	4,271

The total cost figure represents the initial cost of $10,000, which includes a sales commission of 8% as described in prospectus, plus the cumulative amount of income dividends reinvested without sales charge. The dollar amounts of capital gains distributions, reinvested in shares, also without sales commission were: 1940—$74; 1941—$100; 1942—$58; 1943—$474; 1944—$451; 1945—$349; 1946—$814; 1947—$222; 1948—$288; 1949—$125; 1950—$219; 1951—$583; 1952—$436; 1953—$325; 1954—$454; 1955—$745; 1956—$761; 1957—$403; 1958—$669; 1959—$1,303; 1960—$470; 1961—$1,042; 1962—$2,319; 1963—$1,422; 1964—$1,803; 1965—$2,268. Total—$18,177.

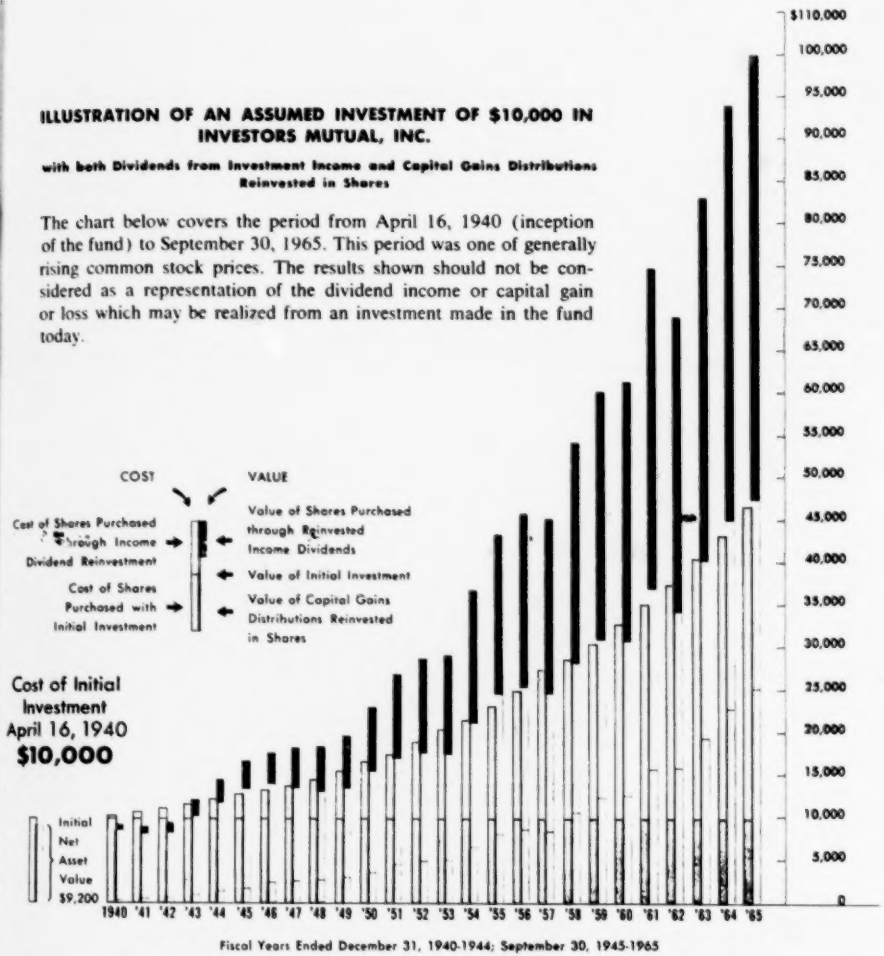
No adjustment has been made for any income taxes payable by shareholders on capital gains distributions and income dividends reinvested in shares.

*Fiscal Years ended December 31, 1940-45; Fiscal Years ended September 30, 1945-1965.
**Adjusted for 2-for-1 stock split 4/26/56.

ILLUSTRATION OF AN ASSUMED INVESTMENT OF $10,000 IN INVESTORS MUTUAL, INC.

with both Dividends from Investment Income and Capital Gains Distributions Reinvested in Shares

The chart below covers the period from April 16, 1940 (inception of the fund) to September 30, 1965. This period was one of generally rising common stock prices. The results shown should not be considered as a representation of the dividend income or capital gain or loss which may be realized from an investment made in the fund today.



Fiscal Years Ended December 31, 1940-1944; September 30, 1945-1965

Initial net asset value is the amount received by the fund after deducting from the cost of the investment the sales commission of 8% as described in the prospectus. Income dividends and capital gains distributions were assumed to have been reinvested in additional shares at net asset value. There is no sales commission charged for such reinvestment.

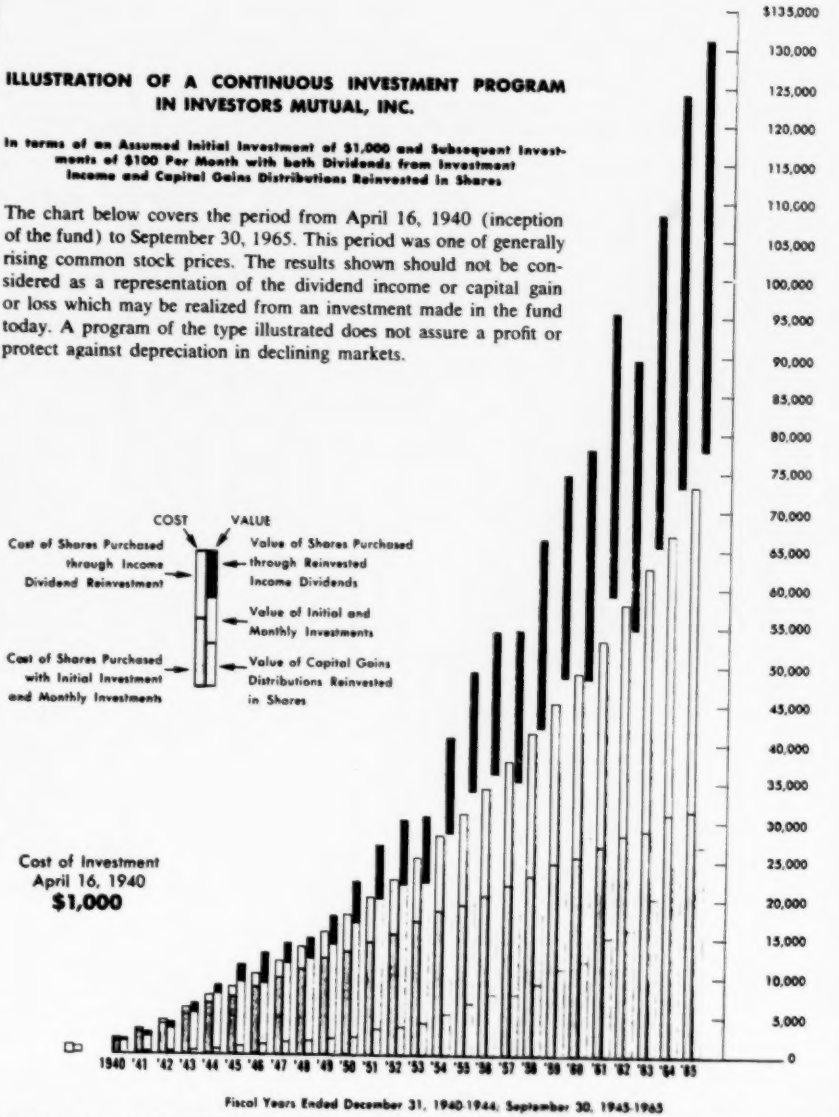
No adjustment has been made for any income taxes payable by shareholders on capital gains distributions and income dividends reinvested in shares.

NOTE: See table on preceding page for dollar amounts represented by this chart.

ILLUSTRATION OF A CONTINUOUS INVESTMENT PROGRAM IN INVESTORS MUTUAL, INC.

In terms of an Assumed Initial Investment of $1,000 and Subsequent Investments of $100 Per Month with both Dividends from Investment Income and Capital Gains Distributions Reinvested in Shares

The chart below covers the period from April 16, 1940 (inception of the fund) to September 30, 1965. This period was one of generally rising common stock prices. The results shown should not be considered as a representation of the dividend income or capital gain or loss which may be realized from an investment made in the fund today. A program of the type illustrated does not assure a profit or protect against depreciation in declining markets.



Fiscal Years Ended December 31, 1940-1944; September 30, 1945-1965

Total cost for each year represents the initial investment of $1,000 plus the cumulative total of monthly investments of $100 per month plus the cumulative amount of income dividends reinvested. The cost for shares purchased with initial and monthly investments includes sales commissions starting at 8% and graduated downward as described in section 15 of the prospectus. No sales commission is charged for reinvestment of any income dividends or capital gains distributions.

No adjustment has been made for any income taxes payable by shareholders on capital gains distributions and income dividends reinvested in shares.

NOTE: See table on following page for dollar amounts represented by this chart.

ILLUSTRATION OF A CONTINUOUS INVESTMENT PROGRAM IN INVESTORS MUTUAL, INC.

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e table below covers the period from April 16, 1940 (inception of the fund) to September 30, 1965. This iod was one of generally rising common stock prices. The results shown should not be considered as a esentation of the dividend income or capital gain or loss which may be realized from an investment de in the fund today. A program of the type illustrated does not assure a profit or protect against de- iation in declining markets.

	COST OF SHARES				VALUE OF SHARES						NUMBER OF SHARES ACQUIRED** (To nearer full share amount)			
ount of dends ein- ment- ment come ested nally	Cumulative Cost of Shares Purchased through Reinvestment of Income Dividends	Total of Initial and Monthly Investments	Total Cost Including Reinvested Income Dividends	Average Cumulative Per Share Cost**	(A) Acquired through Initial and Monthly Investments	(B) Acquired through Reinvestment of Capital Gains Distributions (cumulative)	Sub-Total	(C) Purchased through Reinvestment of Income Dividends (cumulative)	Total Value	Year-end Per Share Value**	(A) Acquired through Initial and Monthly Investments (cumulative)	(B) Acquired through Reinvestment of Capital Gains Distributions (cumulative)	(C) Purchased through Reinvestment of Income Dividends (cumulative)	Total Shares Held (cumulative)
55	$ 55	$ 1,800	$ 1,855	$5.15	$ 1,641	$ 14	$ 1,655	$ 56	$ 1,711	$4.75	345	3	12	360
37	192	3,000	3,192	5.01	2,503	44	2,547	181	2,728	4.28	585	10	42	637
88	380	4,200	4,580	4.82	3,685	70	3,755	377	4,132	4.34	848	16	87	951
41	621	5,400	6,021	4.77	5,440	319	5,759	679	6,438	5.10	1,067	63	133	1,263
06	927	6,600	7,527	4.80	7,277	636	7,913	1,079	8,992	5.73	1,270	111	188	1,569
44	1,171	7,500	8,671	4.86	8,845	932	9,777	1,433	11,210	6.28	1,408	148	228	1,784
19	1,590	8,700	10,290	4.90	9,696	1,511	11,207	1,790	12,997	6.19	1,566	244	289	2,099
38	2,128	9,900	12,028	5.02	10,503	1,646	12,149	2,271	14,420	6.02	1,744	273	377	2,394
58	2,786	11,100	13,886	5.08	10,966	1,799	12,765	2,781	15,546	5.69	1,929	316	489	2,734
38	3,624	12,300	15,924	5.14	12,340	1,952	14,292	3,694	17,986	5.81	2,125	336	636	3,097
06	4,530	13,500	18,030	5.22	14,903	2,386	17,289	5,044	22,333	6.47	2,303	369	779	3,451
50	5,680	14,700	20,380	5.27	17,209	3,160	20,369	6,599	26,968	6.97	2,468	453	946	3,867
50	6,930	15,900	22,830	5.35	18,473	3,644	22,117	7,896	30,013	7.04	2,626	518	1,122	4,266
99	8,329	17,100	25,429	5.44	18,749	3,841	22,590	8,905	31,495	6.73	2,784	571	1,322	4,677
41	9,870	18,300	28,170	5.54	23,890	5,152	29,042	12,366	41,408	8.14	2,935	633	1,519	5,087
16	11,586	19,500	31,086	5.65	27,803	6,599	34,402	15,517	49,919	9.08	3,063	727	1,710	5,500
23	13,609	20,700	34,309	5.78	28,988	7,504	36,492	17,527	54,019	9.11	3,183	824	1,924	5,931
26	15,835	21,900	37,735	5.93	28,265	7,539	35,804	18,568	54,372	8.55	3,305	882	2,171	6,358
87	18,222	23,100	41,322	6.05	33,361	9,379	42,740	23,647	66,387	9.72	3,432	965	2,433	6,830
79	20,701	24,300	45,001	6.14	36,040	11,441	47,481	27,139	74,620	10.18	3,540	1,124	2,666	7,330
56	23,457	25,500	48,957	6.30	36,527	11,833	48,360	29,354	77,714	10.00	3,652	1,183	2,935	7,770
56	26,413	26,700	53,113	6.44	43,485	15,027	58,512	37,012	95,524	11.58	3,757	1,298	3,197	8,252
21	29,634	27,900	57,534	6.43	38,403	15,919	54,322	34,782	89,104	9.95	3,858	1,600	3,494	8,952
65	33,199	29,100	62,299	6.53	44,994	20,008	65,002	43,300	108,302	11.35	3,963	1,762	3,814	9,539
51	37,150	30,300	67,450	6.64	49,593	23,912	73,505	50,608	124,113	12.22	4,060	1,958	4,143	10,161
40	41,590	31,500	73,090	6.73	50,904	27,017	77,921	55,231	133,152	12.26	4,153	2,204	4,506	10,863

total cost figures represent the initial investment of $1,000 plus the cumulative total of monthly investments of $100 month plus the cumulative amount of income dividends reinvested. The cost for shares purchased with initial and nthly investments includes sales commissions starting at 8% and graduated downward as described in section 15 of the spectus. No sales commission is charged for reinvestment of any income dividends or capital gains distributions. Year asset values include the value of shares purchased by reinvestment of the following dollar amounts of capital gains dis- tions: 1940—$14; 1941—$31; 1942—$25; 1943—$242; 1944—$272; 1945—$232; 1946—$595; 1947—$176; 1948— 1949—$114; 1950—$211; 1951—$589; 1952—$457; 1953—$354; 1954—$510; 1955—$856; 1956—$895; 1957— 1958—$818; 1959—$1,618; 1960—$592; 1961—$1,332; 1962—$2,998; 1963—$1,859; 1964—$2,382; 1965—$3,023. l—$20,924.

djustment has been made for any income taxes payable by shareholders on capital gains distributions and income divi- ds reinvested in shares.

iscal Years ended December 31, 1940-45; Fiscal Years ended September 30, 1945-1965.

djusted for 2-for-1 stock split 4/26/56.

11 Investment Restrictions

The Company observes certain investment restrictions which may not be changed without stockholder action and which provide among other things that the Company:

(1) Shall not purchase securities on margin or sell short;

(2) Shall not invest more than 5% of the gross assets of the Company taken at cost in securities of any one corporation;

(3) Shall not acquire more than 10% of the outstanding voting securities of any one corporation;

(4) Shall not borrow money or property except as a temporary measure for extraordinary or emergency purposes. The Certificate of Incorporation limits borrowing to 10% of the gross assets of the Company taken at cost;

(5) Shall not invest more than 5% of the total assets of the Company in securities of companies which have a record of less than three years' continuous operation, including predecessor companies;

(6) Shall not sell any of its shares at less than asset value;

(7) Shall not purchase securities of an investment trust or an investment company except in the open market where there is no profit to a sponsor or dealer thereof other than customary brokerage;

(8) Shall not buy from or sell to any officer or director of Investors Diversified Services, Inc., or of the Company, any property or any security other than securities issued by the Company;

(9) Shall not make any loans to any of its officers or directors, or to any firm or syndicate of which any such officer or director is a member, or to any association or corporation of which any of the Company's officers or directors is an officer or a director, or in which the officers and directors of the Company directly or indirectly hold an aggregate interest of ten per cent (10%) or more; nor shall it loan any part of its assets to Investors Diversified Services, Inc., or any officer or director of that company;

(10) Shall not pledge, mortgage, or hypothecate the assets of the Company, taken at market value, to an extent greater than 15% of the gross assets of the Company taken at cost.

The Company is also subject to restrictions under the provisions of the Investment Company Act of 1940, particularly as to transactions with certain affiliated persons and underwriters, changing of certain investment policies recited in its registration statement, and the investment of its funds in certain specified types of companies.

12 Free Transfer of Investments

Investors Diversified Services, Inc. acts as the underwriter and investment manager for Investors Mutual, Inc., Investors Selective Fund, Inc., Investors Stock Fund, Inc., and Investors Variable Payment Fund, Inc. (these open-end, diversified investment companies being included in what is frequently referred to as the "Investors Group"). The shareholders of these companies (each of which differs from the others as to investment policies and purposes) have the privilege of transferring without sales charge their investments in shares of one or more of the companies into investments in shares of any of the other companies at respective net asset values. In the case of Investors Selective Fund, Inc., there are certain restrictions regarding transfers from that Fund as explained in the prospectus of that Company.

This privilege is not an option or right to purchase such securities but is a privilege permitted under the present policy of each of these companies. This policy may be discontinued, cancelled or changed by any of the respective companies at any time. The privilege of transferring investments will be extended by the present managements of the respective companies in the absence of objection by regulatory authorities and provided shares of the respective companies are available and may lawfully be so issued in the jurisdiction in which any shareholder wishing to exercise this privilege resides, or until the privilege, in the opinion of the managements of the respective companies, imposes an unwarranted and unreasonable burden or hardship on the respective companies.

The transfer of investment is effected by authorizing the Company to redeem the shares and apply the proceeds to the purchase of shares of the other specified company. For federal income tax purposes of the shareholder redemption of the shares being transferred is ordinarily the equivalent of a sale of the shares. The company receiving the transferred investment will deliver a current prospectus and upon receiving a signed receipt therefor will issue its shares at asset value.

13 Custodianship of Assets

Portfolio securities and cash of the Company are deposited, under a custodian agreement, with the Bank of Delaware, of Wilmington, Delaware. This institution maintains custody of all securities and cash of the Company so deposited but otherwise performs no managerial or policy-making functions for the Company.

14 Offering Price of Shares

(a) Shares of the Company are offered at their public offering price at the close of business [as defined in sub-section (j)] on the day upon which the application and payment are received at the principal place of business of the Company. If these are not received prior to the close of business, the shares are issued at the public offering price as of the close of business on the next succeeding full business day. If the day upon which the application and payment are received at the principal place of business of the Company is not a full business day, the price of the shares is computed as of the close of business on the next succeeding full business day.

(b) The asset value is computed as of the close of trading on the New York Stock Exchange in accordance with sound accounting practice and in the manner authorized by the Board of Directors, as follows: Securities listed on national securities exchanges are valued on the basis of the closing sale each day, or if no sale is made, at the mean of the closing bid and asked prices of such securities. Securities not listed or traded on a national securities exchange, but for which market quotations are readily available, are valued at market value as defined in the Certificate of Incorporation. Securities having no current market price are valued at fair value as determined in good faith by the Board of Directors. Dividends declared but not received are accrued on the ex-date of such dividends. Interest on bonds not traded "flat" is accrued daily. All cash and receivables and current payables are carried at their face value. The investment advisory and services fee, which comprises the entire management and operating expense of the Company, is accrued daily. No taxes are accrued on unrealized appreciation since the Company has elected to meet the requirements of Sections 851-855 of the federal Internal Revenue Code and intends to distribute to stockholders any capital gains realized. See section 22(g). From the total value of the assets are deducted the total outstanding liabilities (exclusive of capital stock and surplus accounts) including all reserves and estimated accrued expenses. The resulting net worth is divided by the number of shares outstanding to determine the asset value per share of capital stock.

(c) Computation of the public offering price of shares of capital stock of the Company is illustrated below:

Net assets at September 30, 1965 as per Statement of Net Assets (Page 24)	$2,940,769,421
Divided by number of shares outstanding September 30, 1965	239,926,645
Asset value of a share of capital stock	$12.257
Plus 8%* of public offering price	1.063
Public offering price [$12.257 ÷ .92]	$13.32

*Sales Charges are graduated as follows:

Amount of Application	Per Cent of Public Offering Price
To $14,999	8
$15,000 to $19,999	7½
$20,000 to $24,999	7
$25,000 to $49,999	6
$50,000 to $99,999	4
$100,000 to $199,999	2½
$200,000 to $399,999	2
$400,000 to $699,999	1½
$700,000 and over	1

(d) The above graduated sales charges will apply on initial purchases in the amounts stated and also on any subsequent purchases where the aggregate investment of the same shareholder (and to the extent that such shares are still registered in his name) is $15,000 or more; for example, if a shareholder had previously purchased and still held shares for which he had paid $10,000 and made a subsequent purchase of $6,000, the sales charge applicable to this latter pur-

chase would be 7½%. If such shareholder after his initial purchase (shares still held by him) had made an application for an additional $11,000, bringing his aggregate investment to $21,000, the sales charge on the latter purchase would be 7%. Shares held in the name of the spouse of the purchaser or in the name of a child of the purchaser under 21 years of age will be treated for purposes of this section as being registered in the name of the purchaser. Reinvested dividends and reinvested capital gains distributions (see sections 7 and 9) are included in determining the aggregate amount invested, although no sales charge is made for such reinvestment.

(e) The foregoing paragraph is applicable to a trustee or other fiduciary purchasing securities for a single trust estate or single fiduciary account (including a pension, profit-sharing, or other employee benefit trust created pursuant to a plan qualified under Section 401 of the Internal Revenue Code).

(f) Since Investors Diversified Services, Inc. is also the principal distributor for shares of Investors Stock Fund, Inc., Investors Selective Fund, Inc., Investors Variable Payment Fund, Inc. and Investors Inter-Continental Fund, Inc., the graduated scale of sales charges applicable in the manner stated above will apply to purchases by any of the persons enumerated in (d) or (e), above, of shares representing a combination of the five Funds or an addition to the aggregate holdings in those companies. For example, if an investor had purchased and still held shares of Investors Stock Fund, Inc. for which he paid $15,000, and he made a purchase of shares of Investors Mutual, Inc. in an amount of $6,000, the rate of sales charge applicable on this latter purchase would be 7%, as shown in the foregoing table. There is a different graduated scale of sales charges with respect to Investors Selective Fund, Inc.

(g) In addition, the reduced sales charges reflected under sub-section (c) are also applicable to the aggregate amount of purchases made by any of the persons enumerated above within a thirteen months period pursuant to a written statement of intention provided by the principal distributor, which includes provisions for a price adjustment depending upon the actual amount purchased within such period, provided that the purchases aggregate not less than $50,000 and the investor still owns the shares at the end of the period. This is not an option, warrant or right to purchase additional shares and there is no penalty upon either party if the intention is not fulfilled.

As an example of how this reduced sales charge is applied, let us assume a purchaser submits, with his application for $10,000, a written statement of his intention to invest a total of $50,000 at various times during the next succeeding thirteen months. On his initial investment of $10,000 he would pay a sales charge of 8%. Thereafter he invests an additional $10,000, bringing his total holdings to $20,000. On the latter investment he would pay the sales charge applicable to holdings of $20,000, or 7%. This method would continue on his other purchases during the period according to the schedule in sub-section (c), and with the last investment for the period he would receive an adjustment on his total purchases (still held by him) of $50,000 for the difference between the respective sales charges paid and the 4% sales charge applicable on the $50,000 aggregate investment. In other words, he would receive the same benefit of the 4% sales charge as though he had made the $50,000 investment in a single purchase. Further, should it develop that his aggregate purchases during the period exceed the $50,000 originally specified by an amount sufficient to qualify for an additional quantity discount (for example, should his actual purchases equal $100,000), he would receive the same benefit as though he had specified the larger amount in his original statement of intention.

(h) Officers, directors, employees and sales representatives of the distributor or of the Company (and any trust, pension, profit-sharing or other benefit plan for such persons) may be permitted to purchase shares of the Company at net asset value, provided that such purchases are made upon the written assurance of the purchaser that the purchase is made for investment purposes and that shares so acquired will not be resold except through regular redemption by the Company.

(i) The bylaws of the Company provide that during any period in which the sale of shares issued by the Company shall be discontinued, the Board of Directors, in arriving at asset value for redemption purposes, may deduct from the value of the assets an amount equal to the brokerage commissions, transfer taxes and charges, if any, which would be payable on the sale of all securities in the portfolio of the Company if they were then being sold. The purpose of this provision is to distribute these charges over all outstanding shares if redemptions continue when no further sales are being made.

(j) A "full business day" is defined as a day with respect to which the New York Stock Exchange is open for business, and with respect to which the actual time of closing of such Exchange is that time which shall have been scheduled for such closing in advance of the opening of such Exchange. The "close of business" is defined as the time of closing of the New York Stock Exchange.

5 Distribution of Shares

Since the inception of the Company, its shares ave been distributed exclusively by Investors Diver-fied Services, Inc. (IDS), of Minneapolis, Minne-ota, pursuant to distribution agreements, the most cent of which is dated April 6, 1963 and reexecuted n October 31, 1963. Applications for shares of the ompany are solicited by representatives of the dis-ibutor and submitted to the Company for acceptance r rejection.

IDS receives, in full payment for its services as istributor of the shares of Capital Stock of the Com-any, a fee equal to the difference between the mount received with each application and the asset alue of the shares sold pursuant to such application, etermined as stated in section 14 which also gives he present rate of the distribution fee. IDS received during the fiscal year ended September 30, 1965, distribution fees amounting to $20,276,818, out of which it allowed commissions of $13,990,881 to its sales representatives and paid other expenses incidental to and in connection with the distribution and sale of the Company's Capital Stock.

During the period of the distribution agreement IDS will pay certain expenses in connection with the issuance and sale of the Company's securities, as specified by the agreement. The agreement provides that it shall continue in effect from year to year after April 6, 1963 provided such continuance is approved annually by the Board of Directors of the Company or by a vote of the majority of the outstanding shares of the Company. The agreement may be terminated by either party upon sixty days' written notice.

6 Redemption of Shares

(a) By express provision in the Company's ertificate of Incorporation, the registered holder of hares of the Company has the right to require the ompany to redeem his shares. The redemption is ccomplished by delivering to the Company at its rincipal place of business the stock certificate and a ritten request for redemption in form satisfactory o the Board of Directors. There is no redemption harge. Redemption of all or any part of shares for hich a certificate has not been issued may be effected y a written request signed by the registered owner nd directed to the Company.

(b) The redemption value of shares will be the sset value calculated as of the close of business (as efined in section 14(j)) on the day of receipt of the urrendered stock certificate or request at the Com-any's principal place of business. If the day of sur-ender of the certificate or request is not a full busi-ess day, then the asset value for the purposes of edemption will be calculated as of the close of busi-ess on the next succeeding full business day.

The method of calculating the asset value of shares s shown in section 14(b). For a change in the ethod of calculating redemption value if the sale f shares of the Company is discontinued, see section 4(i). The market value of securities in the Com-any's portfolio is subject to daily fluctuations, and he asset value will fluctuate accordingly. The amount shareholder will receive on redemption of his shares ay be more or less than the price paid therefor, depending upon the market value of the portfolio securities at the time of redemption. The Company presently pays the redemption value in cash as soon as the amount is determined. Payment may not be deferred for a period exceeding seven days except during a period of emergency.

(c) During any period of emergency, the Board of Directors, in its discretion, may suspend the computation of asset value for the purpose of issuing or redeeming its shares, may suspend the acceptance of payments from the holders or owners of any of its securities for the acquisition of additional shares of the Company, and may suspend the obligation of the Company to redeem stock.

A period of emergency is defined to be:

(1) A period during which the New York Stock Exchange is closed for other than customary week-end or holiday closings, or during which trading on the New York Stock Exchange is restricted;

(2) A period during which disposal by the Company of securities owned by it is not reasonably practicable or during which it is not reasonably practicable for the Company fairly to determine the value of its net assets; or

(3) Such other periods as the Securities and Exchange Commission, pursuant to the provisions of the Investment Company Act of 1940, may by order declare as an emergency period or periods.

17 Systematic Pay-out Options

The Company makes available to its shareholders, without additional charge, periodic withdrawal or pay-out options designed to meet the differing objectives of shareholders. The cost of administering them is, pursuant to contract, borne by Investors Diversified Services, Inc. (IDS), the Fund's investment manager and distributor. These pay-out options contemplate the liquidation of the shareholder's holdings of Fund shares, and amounts received during the pay-out period will represent a combination of principal and income. Dividends and capital gains distributions made to the Fund's shareholders must be reinvested at net asset value in additional shares of the Fund by investors who select a systematic pay-out plan.

Option 1. Variable pay-out over a stated number of years by monthly, quarterly, or annual redemptions of shares—for the shareholder who desires to spread the pay-out of his holdings over a fixed number of years on a basis that will tend to be reasonably responsive to changes in the purchasing power of the dollar.

This option provides a method of periodic (monthly, quarterly, or annual) redemption of shareholdings, including shares, if any, created by reinvestment of dividends and realized capital gains during the pay-out period, over the number of years specified by the owner. It is designed to produce payments to the shareholder from period to period which will vary with the performance of the Fund (i.e., will vary with changes in the market value of the securities in the Fund portfolio). Obviously, it is impossible to give any assurances of the extent, if any, to which these variations will match changes in the purchasing power of the dollar. Under this option all shares will be redeemed and the shareholder's investment entirely liquidated by the end of the specified number of years.

The number of years and the payment frequency will be those specified by the shareholder at the time he elects the option. The number of shares redeemed to make each payment will be calculated by dividing the total shares then available (including such shares, if any, as have been added from time to time through reinvestment of dividends and realized capital gains during the pay-out period) by an appropriate variable payment factor. The only purpose served by the variable payment factor is to determine the number of shares to be redeemed. The dollar amount of each payment will depend both on number of shares redeemed and asset value per share at the time payment is made.

Option 2. Variable pay-out by monthly, quarterly, or annual redemptions of a stated number of shares each period until all shares are redeemed. The payment frequency and number of shares will be specified by the shareholder in his request for pay-out option. The length of time over which payments will be made will depend upon the total number of shares owned, including such shares, if any, as have been added from time to time through reinvestment of dividends and realized capital gains during the pay-out period.

Option 3. Pay-out by monthly, quarterly, or annual redemptions of shares to provide a specified dollar amount each period until all shares are redeemed. The payment frequency and dollar amount of each payment will be specified by the shareholder in his request for pay-out option.

To elect one of the options, the shareholder should make written request on or before the date he wishes payments to begin. The option elected will remain in effect unless subsequently changed at the request of the shareholder. While there is no minimum dollar amount requirement for opening a systematic pay-out plan, a limitation on the availability of these options is that each payment under Option 3 shall be not less than $50 and that the initial payment (and the final payment after a request for change would become effective) under either Option 1 or Option 2 shall be not less than $50. These pay-out options have been designed to meet the needs of most shareholders and are in a form that IDS can handle expeditiously and at reasonable cost. If a shareholder wishes any other pay-out method or methods the procedure set out in section 16 will be followed, with the shareholder making a separate written request for each redemption. To meet situations presently unforeseen, the Company reserves the right to alter or discontinue any systematic pay-out plan elected by any shareholder and to discontinue the availability of any such plans in the future. The purchase of shares in a mutual fund either occasionally or pursuant to a systematic investment plan, at the same time as a systematic pay-out plan is in effect with respect to the same or any other fund would normally be disadvantageous to an investor because he would be paying a sales load on the amount being invested at the same time as he would be withdrawing money on which he had already paid a sales load. Mutual funds distributed by IDS will not accept applications for fund shares made pursuant to a systematic investment plan while a systematic pay-out plan is in effect with respect to any of such funds. However, isolated or occasional investments on a non-regular basis may be accepted. Attention is also called to the fact that if withdrawals by an investor under a systematic pay-out plan are in excess of current dividend income from his shares, he will reduce and may ultimately exhaust his principal.

18 Remuneration and Fees

Investors Diversified Services, Inc. (IDS) pays or reimburses the Company for the entire remuneration of all directors and officers of the Company. During the fiscal year ended September 30, 1965, IDS received $10,438,087 as fees under the investment advisory and services agreement with the Company as described below.

IDS has acted as investment adviser of the Company since the Company's inception. On October 15, 1964 the present investment advisory and services agreement was approved by stockholders of the Company and entered into on that date. The present agreement provides for a graduated scale of fees equal on an annual basis to .50% on the first $350 million of average net assets, .47% on the next $300 million, .44% on the next $250 million, .41% on the next $250 million, .38% on the next $250 million, .35% on the next $250 million, .32% on the next $250 million and .30% on all assets in excess of $1.9 billion. The agreement also provides for a flat reduction of $170,000 a year ($14,166.67 monthly) from the fees computed in accordance with that scale.

The advisory and services fee is payable monthly but is calculated daily on the basis of net assets at the close of business each day.

The agreement provides that all expenses of the Company will be absorbed by IDS except (a) the fee under the agreement, (b) contractual expenses relating to the sale and distribution of the Company's shares, (c) certain taxes, and (d) broker's fees on the purchase and sale of assets. In addition, the agreement provides that IDS shall pay or reimburse the Company for legal fees and expenses of outside counsel and professional consultants employed by it provided they are reasonable in amount.

The agreement requires that IDS, among other things, provide the Company with investment research and advice and make specific investment recommendations, subject to the direction and control of the Board of Directors, the Executive Committee and the officers of the Company. It will remain in effect until September 30, 1966, and may continue from year to year thereafter, provided such continuance after September 30, 1966 is specifically approved at least annually (1) by vote of the Directors of the Company and by vote of a majority of the directors who are not parties to such agreement or affiliated persons of any such party or (2) by vote of a majority of the outstanding voting securities of the Company. Such a majority vote is defined in the Investment Company Act of 1940 as 67% or more of the voting securities present at a stockholders' meeting, if more than 50% of such outstanding shares are present or represented by proxy, or more than 50% of the outstanding voting securities, whichever is less. The agreement also provides that it may be terminated without penalty by either party on 60 days' written notice, provided that such termination on the part of the Company is approved either by the Board of Directors or by a vote of a majority of the outstanding voting securities of the Company as defined above, and that it will terminate automatically in the event of its "assignment" by IDS as defined in such Act.

Reference is also made to section 15 for a statement as to sales charges received by IDS, as distributors of shares of the Company.

19 Officers and Directors

The directors and executive officers of the Company are listed below, together with information which includes their principal occupations during the past five years.

Harold K. Bradford*
1000 Roanoke Building
Minneapolis, Minn.
Chairman of the Board of Directors and President

Chairman of the Board, President and Director, Investors Mutual, Inc., Investors Selective Fund, Inc., Investors Variable Payment Fund, Inc., Investors Stock Fund, Inc. and Investors Inter-Continental Fund, Inc. (formerly Ltd.).

W. Grady Clark
Investors Building
Minneapolis, Minn.
Director

Retired; Mr. Clark served as President of Investors Diversified Services, Inc. from July, 1960 to February, 1963 and thereafter as Chairman of the Board of that Company until he retired at the end of 1964. He is a Director of Investors Diversified Services, Inc., Investors Syndicate of America, Inc., Investors Syndicate Life Insurance and Annuity Company, Investors Mutual, Inc., Investors Selective Fund, Inc., Investors Stock Fund, Inc., Investors Variable Payment Fund, Inc. and Investors Inter-Continental Fund, Inc.

* Member of Executive Committee

Gen. Mark W. Clark U. S. A., Retired Charleston, S. C. *Director*	President Emeritus, The Citadel, the Military College of South Carolina. Director Investors Mutual, Inc., Investors Selective Fund, Inc., Investors Stock Fund, Inc., Investors Variable Payment Fund, Inc., Consolidated Foods Corp. and Dayco Corporation. Prior to his retirement from active duty with the Army, General Clark was, among other things, Chief of Staff of the Army Ground Forces and commanding general of the U. S. 5th Army during World War II, and commanding general of the U. S. Army Forces in the Far East during the Korean War.
John C. Cornelius* Northwestern Bank Building Minneapolis, Minn. *Director*	Retired executive vice president of and now senior consultant to the advertising firm of Batten, Barton, Durstine & Osborn. Mr. Cornelius is a Director of Investors Mutual, Inc., Investors Selective Fund, Inc., Investors Stock Fund, Inc., Investors Variable Payment Fund, Inc., Investors Inter-Continental Fund, Inc., Rexall Drug & Chemical Company, Red Owl Stores, Inc. and Doughboy Industries.
Lewis L. Crosby* 1104 Roanoke Bldg. Minneapolis, Minn. *Director*	Retired as Vice President of Cargill, Inc. in 1964; now a Director, member of Executive Committee and Consultant to Chicago Great Western Railway. Director, Investors Mutual, Inc., Investors Stock Fund, Inc., and Investors Selective Fund, Inc.
Randall F. Fullmer 1140 Terminal Tower Cleveland, Ohio *Director*	Partner in the law firm of Burgess, Fullmer, Parker & Steck, Cleveland, Ohio. Mr. Fullmer, a Director of Investors Mutual, Inc., Investors Selective Fund, Inc., Investors Stock Fund, Inc. and Investors Variable Payment Fund, Inc., is also a Director of the Bulkley Building Company, Director of and Counsel for Duplex Manufacturing and Foundry Company.
Laurence M. Gould Tucson, Ariz. *Director*	Geologist. President Emeritus, Carleton College. Mr. Gould is a Director of Investors Mutual, Inc., Investors Selective Fund, Inc., Investors Stock Fund, Inc. and Investors Variable Payment Fund, Inc.
Frederick L. Hovde Purdue University Lafayette, Ind. *Director*	President, Purdue University. Mr. Hovde is a Director of Investors Mutual, Inc., Investors Selective Fund, Inc., Investors Stock Fund, Inc., Investors Variable Payment Fund, Inc., General Electric Company and Inland Steel Company.
Richard M. Nixon 20 Broad Street New York, N. Y. *Director*	Partner in law firm of Nixon, Mudge, Rose, Guthrie & Alexander, New York, N. Y., 1963 to present. From January 1, 1961 to January 1, 1963 Counsel to law firm of Adams, Duque & Hazeltine, Los Angeles, California. Vice President of United States from 1953 to 1961. Mr. Nixon is a Director of Investors Mutual, Inc., Investors Selective Fund, Inc., Investors Stock Fund, Inc., Investors Variable Payment Fund, Inc., and Harsco Corporation.
Robert C. Reed 339 E. Foster Place Lake Forest, Ill. *Director*	Personal investments. Director of Investors Mutual, Inc., Investors Selective Fund, Inc., Investors Stock Fund, Inc. and Investors Variable Payment Fund, Inc.
Stuart F. Silloway 800 Investors Building Minneapolis, Minn. *Director*	President and director of Investors Diversified Services, Inc., Investors Syndicate of America, Inc. and Investors Syndicate Life Insurance and Annuity Company. Mr. Silloway was President of the investment banking firm of Harriman, Ripley & Co., Inc. until September, 1963 and then a partner of Brooks, Harvey & Co., mortgage bankers, until July, 1964 when he became President of Investors Diversified Services, Inc. Director, Investors Mutual, Inc., Investors Stock Fund, Inc., Investors Selective Fund, Inc., and Investors Variable Payment Fund, Inc.

* Member of Executive Committee

George E. MacKinnon 1000 Roanoke Building Minneapolis, Minn. *General Counsel and Vice President*	Lawyer in Minneapolis since 1929; Assistant Counsel Investors Syndicate 1929-1942; Minnesota State Representative 1934-1942; U. S. Navy 1942-1946; Member of Congress 1947-1948; U. S. District Attorney—Minnesota 1953-1958; Special Assistant to U. S. Attorney General 1960; General Counsel and Vice-President of Investors Mutual, Inc., Investors Selective Fund, Inc., Investors Stock Fund, Inc., Investors Variable Payment Fund, Inc. and Investors Inter-Continental Fund, Inc. (formerly Ltd.) 1961 to date.
George A. Mahon Investors Building Minneapolis, Minn. *Vice President*	Vice President, Investors Diversified Services, Inc., Investors Syndicate of America, Inc., Investors Mutual, Inc., Investors Selective Fund, Inc., Investors Stock Fund, Inc., Investors Variable Payment Fund, Inc., and Investors Inter-Continental Fund, Inc.
Norman B. Waag Investors Building Minneapolis, Minn. *Vice President*	Vice President, Investors Diversified Services, Inc., Investors Syndicate of America, Inc., Investors Mutual, Inc., Investors Selective Fund, Inc., Investors Stock Fund, Inc., Investors Variable Payment Fund, Inc. and Investors Inter-Continental Fund, Inc. Director, Investors Syndicate of America, Inc. and Investors Syndicate Life Insurance and Annuity Company.
Robert S. Ersted 1000 Roanoke Building Minneapolis, Minn. *Secretary and Treasurer*	Mr. Ersted became Secretary and Treasurer of Investors Mutual, Inc., Investors Selective Fund, Inc., Investors Stock Fund, Inc., Investors Variable Payment Fund, Inc., Investors Inter-Continental Fund, Inc. (formerly Ltd.) in June 1962. During the preceding five years he was a practicing lawyer in Minneapolis.

20 Certain Information Concerning Investors Diversified Services, Inc.

Investors Diversified Services, Inc. (IDS), the investment adviser and distributor for the Company, has outstanding 4,395,905 shares of Class A Common Stock and 11,490,800 shares of Class B Common Stock, both classes having equal per-share voting rights. Alleghany Corporation (Alleghany), 350 Park Avenue, New York, N. Y. owns beneficially 495,815 shares of Class A Common Stock and 6,295,360 shares of Class B Common Stock, constituting 42.75% of the outstanding voting stock of IDS, and giving it control of IDS within the meaning of the Investment Company Act of 1940. Allan P. Kirby, 117 DeHart Street, Morristown, N. J. owns beneficially 4,084,813 shares (approximately 40.52%) of the outstanding Common Stock of Alleghany. Mr. Kirby and certain associates have stated to the Company that they will not promote and that they will use their best efforts to avoid any change being made in the incumbent IDS officer occupying the position of Vice President-Sales of IDS without ample advance notice to the President of the Company and the fullest consultation with him regarding the change and as to the suitability of the proposed replacement, and they will not promote and they will use their best efforts to avoid any change being made with respect to the present policies of IDS involving the sale of shares of the Company, or the use of the IDS sales force in connection with or in relation to such sales and which will affect the offering or sale of shares of the Company, or in the present operating policies of the Investment Department of IDS as they relate to the Company, without ample advance notice to and the fullest consultation with the President of the Company. The President of the Company has stated that in such event he would in turn consult with the Board of Directors.

21 Indemnification of Officers and Directors

On December 15, 1961, the directors of the Company passed a resolution providing for the indemnification by the Company, to the extent permitted by law, of past and present officers and directors against expense incurred by them in connection with the defense of any legal action in which they are made parties by reason of their office. In the opinion of counsel for the Company, concurred in by counsel for IDS, such expense if payable by the Company may be recoverable by the Company from IDS.

Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors or officers of the Company pursuant to the above resolution, or otherwise, the Company has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the Company of expenses incurred or paid

by a director or officer of the Company in the successful defense of any action, suit or proceeding) is asserted by such director or officer in connection with the securities registered, the Company will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Act and will be governed by the final adjudication of such issue.

22 Miscellaneous

(a) Shares of stock issued by the Company are all of one class, designated Capital Stock, with a par value of $.50 per share. All shares are fully paid, non-assessable and transferable, with equal rights to earnings, dividends and assets. All shares have equal voting rights. Shares may be issued as full or fractional shares. Each fractional share has the same rights, including voting rights, which are provided for a full share but in the proportion which a fractional share bears to a full share. The shares have cumulative voting rights when voting upon the election of directors.

(b) Annual and semi-annual financial reports of the Company are mailed to each shareholder. The Company's financial statements as of the close of each fiscal year (September 30th) are examined by a firm of independent certified public accountants. The accounting firm of Peat, Marwick, Mitchell & Co., Minneapolis, Minnesota, has for a number of years been selected for this purpose.

(c) The Board of Directors of the Company, at its discretion, may require the payment of a fee not exceeding $1.00 for each new stock certificate issued by the Company as a result of transfers or assignments, or as the result of lost, stolen, mutilated or destroyed certificates, or in connection with any special service by request, by a shareholder requiring the issuance of a new certificate, in addition to the payment of any lost instrument bond premiums, and federal or state taxes required to be paid in connection therewith.

(d) Investors Mutual, Inc. was incorporated on January 18, 1940 under the laws of the State of Nevada. Its principal offices are located in Minneapolis, Minnesota. Its charter provides for perpetual existence.

(e) As of September 30, 1965, officers and directors of the Company, as a group, owned less than 1% of the outstanding Capital Stock of the Company.

(f) The Company operates as a mutual diversified investment fund of the open-end type and has registered as such under the federal Investment Company Act of 1940. This registration does not involve supervision of management or investment practices or policies.

(g) In order to minimize federal income taxes, the management of the Company intends to conduct its business and Investors Diversified Services, Inc., its investment manager, intends to make recommendations and approvals as to investments, so that the Company may meet the requirements of Sections 851-855 of the federal Internal Revenue Code. The Company has met such requirements for the past fiscal year.

(h) Investors Diversified Services, Inc. (IDS) acts as principal underwriter and investment adviser for Investors Mutual, Inc., Investors Stock Fund, Inc., Investors Selective Fund, Inc., and Investors Variable Payment Fund, Inc., open-end investment companies. Investors Syndicate of America, Inc., a subsidiary of IDS, issues face-amount certificates. IDS is the sole underwriter (distributor) for Investors Accumulation Plan (IAP) which offers long term investment programs in the form of periodic payment Plan Certificates for the accumulation of shares of Investors Stock Fund, Inc. Other subsidiaries include Investors Syndicate Title & Guaranty Company, an issuer of installment and fully paid participation certificates in the state of New York, Investors Syndicate Life Insurance and Annuity Company, IDS Securities Corp., (a member of the Pacific Coast Stock Exchange), and Investors Accumulation Plan, Inc., sponsor of IAP.

(i) **Keogh Act.** For those self-employed individuals who wish to purchase shares of the Fund in conjunction with the Self-Employed Individuals Tax Retirement Act of 1962 (the Keogh Act) there is available from the distributor a Custodial Account Agreement and a sample Profit-Sharing Plan. The Custodial Account Agreement provides that Investors Diversified Services, Inc. (which is also the distributor) furnishes custodial services as required by such Act. For such services it will receive a service fee of $10.00 for each calendar year or portion thereof payable by the Employer named in the Custodial Account Agreement. The amount of the service fee may change from time to time as a result of negotiations between Employer and Custodian. For further details, including the right to appoint a successor custodian, see the Custodial Account Agreement and Plan.

PEAT, MARWICK, MITCHELL & CO.

CERTIFIED PUBLIC ACCOUNTANTS

ACCOUNTANTS' REPORT

The Board of Directors and the Shareholders of Investors Mutual, Inc.:

We have examined the statement of net assets and capital stock and surplus, and the schedule of investments in securities of Investors Mutual, Inc. as of September 30, 1965 and the related statements of income, realized gain on investments, unrealized appreciation of investments, and surplus for the three years then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances. We secured direct confirmation of the securities owned at September 30, 1965 from the custodian depositary.

In our opinion, such financial statements and schedule present fairly the financial position of Investors Mutual, Inc. at September 30, 1965 and the results of its operations for the three years then ended, in conformity with generally accepted accounting principles applied on a consistent basis.

PEAT, MARWICK, MITCHELL & CO.

Minneapolis, Minnesota
October 22, 1965

STATEMENT A

INVESTORS MUTUAL, INC.
Statement of Net Assets and Capital Stock and Surplus
September 30, 1965

	Cost		
Assets			
Investment in securities—at market value—Schedule 1:			
Common stocks:			
Affiliated company	$ 6,437,254	$ 6,435,000	
Other	1,155,094,066	1,841,006,260	
Preferred stocks	190,735,688	194,008,566	
Bonds	785,292,680	787,206,437	
Short-term notes	66,434,630	66,434,630	
Total	$2,203,994,318	2,895,090,893	
Cash in banks:			
On demand deposit		5,616,349	
Time deposits and interest thereon		29,697,091	
Receivable for investment securities sold		152,687	
Dividends and accrued interest receivable		15,670,655	
Total assets			$2,946,227,675
Liabilities (note 1)			
Payable for investment securities purchased		$ 2,843,466	
Payable for sales charges		1,723,567	
Accrued investment advisory and services fee		891,221	
Total liabilities			5,458,254
Net assets applicable to shares of outstanding capital stock			$2,940,769,421
Capital stock and surplus			
Capital stock—authorized 350,000,000 shares of $.50 par value per share; outstanding 239,926,645 shares		$ 119,963,322	
Surplus, per Statement D:			
Paid-in surplus		2,128,560,891	
Undistributed net income		1,544,158	
Undistributed net realized gain on investments (deficit)		(395,525)	
Total capital stock and surplus		$2,249,672,846	
Unrealized appreciation of investments, per Statement C		691,096,575	
Total—representing value of net assets applicable to outstanding capital stock			$2,940,769,421
Net asset value per share of outstanding capital stock			$ 12.257

See accompanying notes to financial statements.

STATEMENT B

INVESTORS MUTUAL, INC.
Statement of Income

Three years ended September 30, 1965	1965	1964	1963
Income			
Cash dividends on stocks:			
On investments in affiliates	$ 286,000	$ 286,000	$ 240,160
Other	66,593,518	61,102,653	55,808,336
Interest	40,735,267	30,987,347	24,293,534
Other income (note 2)	35,554	625,529	12,707
Total income	$ 107,650,339	$ 93,001,529	$ 80,354,737
Expenses (note 2)			
Investment advisory and services fee	$ 10,438,087	$ 10,431,136	$ 9,472,155
Custodian fee	—	—	181,375
Dividend checks and shareholders' notices and reports	—	—	122,969
Postage	—	—	158,676
Directors' fees	—	—	49,350
Audit fees	—	—	14,880
Other expenses	—	—	80
Total expenses	$ 10,438,087	$ 10,431,136	$ 9,999,485
Percentage of total expenses to total income	9.7%	11.2%	12.4%
Net income	$ 97,212,252	$ 82,570,393	$ 70,355,252
Net realized gain on investments, per Statement C	$ 67,227,940	$ 50,715,497	$ 37,625,137
Increase in unrealized appreciation of investments for the year, per Statement C	$ 6,402,016	$ 169,286,979	$ 244,457,679

See accompanying notes to financial statements.

STATEMENT C

INVESTORS MUTUAL, INC.
Statements of Realized Gain on Investments and Unrealized Appreciation of Investments

Three years ended September 30, 1965	1965	1964	1963
STATEMENT OF REALIZED GAIN ON INVESTMENTS			
Realized gain on sales of investments			
Proceeds from sales of investments:			
Securities of affiliates	$ —	$ —	$ 1,50
U.S. Government obligations	3,447,500	5,362,500	3,00
Short-term notes	538,196,102	371,523,770	267,40
Other securities	246,584,628	166,553,959	201,96
Total proceeds from sales of investments	$ 788,228,230	$ 543,440,229	$ 473,87
Cost of investments sold:			
Securities of affiliates	$ —	$ —	$ 3,42
U.S. Government obligations	3,447,500	5,362,500	3,00
Short-term notes	538,196,224	371,524,343	267,40
Other securities	198,052,516	115,837,889	163,52
Total cost of investments sold	$ 739,696,240	$ 492,724,732	$ 436,25
Realized gain (loss) on sales of investments:			
Securities of affiliates	$ —	$ —	$ 1,85
U.S. Government obligations	—	—	—
Short-term notes	(122)	(573)	
Other securities	48,532,112	50,716,070	36,43
Total realized gain on sales of investments	$ 48,531,990	$ 50,715,497	$ 37,62
Realized gain on exchanges of investments			
Value of investments acquired through exchanges	$ 37,113,078	$ 2,920,168	$ 9,46
Cost of investments released through exchanges	18,417,128	2,920,168	9,46
Realized gain on exchanges of investments	$ 18,695,950	$ —	$
Net realized gain on investments (note 3)	$ 67,227,940	$ 50,715,497	$ 37,62
STATEMENT OF UNREALIZED APPRECIATION OF INVESTMENTS			
Appreciation at beginning of the year	$ 684,694,559	$ 515,407,580	$ 270,94
Appreciation at end of the year	691,096,575	684,694,559	515,40
Increase for the year (note 1)	$ 6,402,016	$ 169,286,979	$ 244,45

See accompanying notes to financial statements.

STATEMENT D

INVESTORS MUTUAL, INC.
Surplus Statements

Three years ended September 30, 1965	1965	1964	1963
PAID-IN SURPLUS			
Balance at beginning of the year	$1,827,486,185	$1,567,434,783	$1,360,652,262
Addition			
Proceeds of sales 34,499,678, 30,253,304 and 25,469,412 shares of capital stock, respectively (note 2), less $.50 a share credited to capital stock	409,525,818	348,094,343	272,261,590
Total	$2,237,012,003	$1,915,529,126	$1,632,913,852
Deduction			
Redemption value of 9,107,757, 7,705,298 and 6,222,595 shares of capital stock, respectively, less $.50 a share charged to capital stock	108,451,112	88,042,941	65,479,069
Balance at end of the year	$2,128,560,891	$1,827,486,185	$1,567,434,783
UNDISTRIBUTED NET INCOME			
Balance at beginning of the year	$ 1,349,849	$ 1,155,071	$ 1,626,696
Net income for the year, per Statement B	97,212,252	82,570,393	70,355,252
Total	$ 98,562,101	$ 83,725,464	$ 71,981,948
Dividends paid in cash (note 4)	97,017,943	82,375,615	70,826,877
Balance at end of the year (note 1)	$ 1,544,158	$ 1,349,849	$ 1,155,071
UNDISTRIBUTED NET REALIZED GAIN ON INVESTMENTS (DEFICIT)			
Net realized gain on investments prior to beginning of the year	$ 310,299,396	$ 259,583,899	$ 221,958,762
Distributions to shareholders prior to beginning of the year	310,559,823	259,880,870	222,168,318
Balance at beginning of the year	$ (260,427)	$ (296,971)	$ (209,556)
Net realized gain on investments for the year, per Statement C	67,227,940	50,715,497	37,625,137
Total	$ 66,967,513	$ 50,418,526	$ 37,415,581
Dividends paid in cash (note 4)	67,363,038	50,678,953	37,712,552
Balance at end of the year	$ (395,525)	$ (260,427)	$ (296,971)

See accompanying notes to financial statements.

INVESTORS MUTUAL, INC.
Notes to Financial Statements

1. Income Taxes:

Since the Company met the requirements of sections 851-855 of the Internal Revenue Code for the three years ended September 30, 1965 and intends to continue to meet such requirements and to distribute taxable income to shareholders in amounts which will avoid or minimize income taxes, no provision is made for income taxes on undistributed net income or unrealized appreciation of investments.

2. Investment Advisory and Services Fee and Sales Charges:

Under the agreement in effect prior to April 6, 1963 the investment advisory and services fee payable to Investors Diversified Services, Inc. (IDS) was a quarterly fee of ⅛ of 1% of the value of the net assets of the Company. On April 6, 1963 (retroactive to January 22, 1963) a new agreement was entered into whereunder a reduced scale of fees on a graduated basis was made effective and IDS agreed to assume certain recurring expenses which were borne by the Company under the previous agreement. However, under the terms of a stipulation of settlement of then pending stockholders' derivative lawsuits, a portion of the fee reduction and the agreement by IDS to assume the additional expenses was not to become effective until final court approval of the settlement was obtained. Meanwhile, the amounts involved were deposited in escrow each month and invested in interest bearing securities. On July 2, 1964, the final court approval of the settlements having been obtained, the total amount then in escrow, $946,873, was received by the Company. A portion of this amount, $505,783, was applicable to the period January 22, 1963 to September 30, 1963, and this amount plus interest earned on the escrow deposit, $22,241, is included in "other income" for the year ended September 30, 1964, while the balance, $418,849, offset all expenses other than the investment advisory and services fee for the year ended September 30, 1964. If the April 6, 1963 agreement had been in effect for the full year ended September 30, 1963 net income of the Company would have been increased by $1,105,171 (including the $505,783 referred to above). On October 15, 1964, a new agreement became effective which provides for a revised graduated scale of fees. If this agreement had been in effect during the year ended September 30, 1964, the investment advisory and services fee would have been $9,236,000. The present agreement and fee scale are further described in this Prospectus under the heading "Remuneration and Fees".

Sales charges by IDS for its services as distributor of the shares of capital stock of Investors Mutual, Inc. during the years ended September 30, 1965, 1964 and 1963 aggregated $20,276,818, $16,634,666 and $12,506,777, respectively. Sales charges are not an expense of the Company. They are deducted from and are not included in the proceeds of sales of capital stock as shown in the accompanying statement of paid-in surplus. From such charges IDS pays commissions to salesmen, salaries and other sales expenses.

3. Cost of Securities Acquired and Basis of Determining Realized Gains:

The cost of securities acquired during the periods was as follows:

	United States Government	Short-term Notes	Other
Year ended September 30:			
1965	$3,447,500	$544,323,382	$470,145,089
1964	5,362,500	340,398,115	420,546,371
1963	3,000,000	302,399,840	322,852,301

Net realized gains were determined on the basis of identified costs for stocks and on the basis of first-in, first-out costs for bonds. Net realized gains on stocks and bonds determined on the basis of average costs for the years ended September 30, 1965, 1964 and 1963 would have been $67,298,528, $50,221,519 and $36,996,878, respectively.

4. Dividends to Shareholders:

The amounts per share of dividends paid during the periods were as follows:

Payable to shareholders of record on	From undistributed income	From net realized gain on investments
Year ended September 30, 1965:		
December 31, 1964	$0.0975	
March 25, 1965	.105	
June 24, 1965	.11	
September 29, 1965	.11625	$0.2875
Total	$0.42875	$0.2875
Year ended September 30, 1964:		
December 31, 1963	$0.0925	
March 25, 1964	.095	
June 25, 1964	.105	
September 24, 1964	.11375	$0.24125
Total	$0.40625	$0.24125
Year ended September 30, 1963:		
December 31, 1962	$0.0925	
March 28, 1963	.095	
June 27, 1963	.1025	
September 26, 1963	.10	$0.20
Total	$0.39	$0.20

SCHEDULE 1

INVESTORS MUTUAL, INC.
Investments in Securities, September 30, 1965

SHARES	NAME OF ISSUER AND TITLE OF ISSUE	COST	MARKET VALUE (a)	PERCENTAGE OF TOTAL MARKET VALUE
COMMON STOCKS				
Aerospace				
128,300	Avco Corp.	$ 3,407,498	$ 2,822,600	.17%
135,000	Lockheed Aircraft Corp.	4,269,981	8,015,625	.28
93,500	North American Aviation, Inc.	4,282,782	5,025,625	.17
		$ 11,960,261	$ 15,863,850	.55%
Agricultural Machinery				
213,000	International Harvester Co.	$ 6,058,726	$ 8,147,250	.28%
Automotive				
618,000	Ford Motor Co.	$ 24,306,801	$ 34,530,750	1.19%
1,224,000	General Motors Corp.	86,131,280	128,520,000	4.44
		$ 110,438,081	$ 163,050,750	5.63%
Banks				
57,400	Bank of California, N. A.	$ 2,008,200	$ 3,271,800	.11%
303,100	Marine Midland Corp.	3,638,522	9,812,863	.34
88,800	National Bank of Detroit	4,370,258	5,827,500	.20
97,700	National City Bank of Cleveland	2,544,735	5,568,900	.19
175,300	Northwest Bancorporation	3,363,402	8,282,925	.29
		$ 15,925,117	$ 32,763,988	1.13%
Building Materials				
200,000	Armstrong Cork Co.	$ 4,717,570	$ 12,000,000	.41%
220,000	Ideal Cement Co.	6,424,099	4,152,500	.14
225,000	Lone Star Cement Co.	5,907,378	3,937,500	.14
200,000	Sherwin-Williams Co.	9,771,762	11,400,000	.39
125,000	U.S. Gypsum Co.	10,674,026	8,312,500	.29
		$ 37,494,835	$ 39,802,500	1.37%
Business Equipment				
244,800	Addressograph-Multigraph Corp.	$ 5,746,782	$ 13,953,600	.48%
173,100	International Business Machines Corp.	53,852,481	88,713,750	3.07
		$ 59,599,263	$ 102,667,350	3.55%
Chemicals				
372,300	Allied Chemical Corp.	$ 16,988,584	$ 18,149,625	.63%
22,500	duPont (E. I.) deNemours & Co.	4,996,617	5,411,250	.19
225,000	Hercules Powder Co.	4,728,169	9,000,000	.31
302,800	Monsanto Co.	12,014,580	25,359,500	.87
400,000	Union Carbide Corp.	24,436,083	26,700,000	.92
		$ 63,164,033	$ 84,620,375	2.92%
Containers—Metal and Glass				
200,000	Owens-Illinois, Inc.	$ 8,244,839	$ 11,600,000	.40%

SCHEDULE I

INVESTORS MUTUAL, INC.
Investments in Securities, Continued

(continued)

COMMON STOCKS (Continued)

SHARES	NAME OF ISSUER AND TITLE OF ISSUE	COST	MARKET VALUE (a)	PERCENTAGE OF TOTAL MARKET VALUE
	Drugs			
214,000	American Home Products Corp.	$ 1,077,724	$ 16,879,250	.59%
225,000	Pfizer (Chas.) & Co., Inc.	3,879,689	13,978,125	.48
		$ 4,957,413	$ 30,857,375	1.07%
	Electrical Equipment and Appliances			
320,000	Emerson Electric Co.	$ 11,642,206	$ 17,800,000	.61%
409,100	General Electric Co.	30,101,900	47,864,700	1.65
430,900	Westinghouse Electric Corp.	14,676,689	24,184,263	.84
200,000	Whirlpool Corp.	3,488,073	8,600,000	.30
		$ 59,908,868	$ 98,448,963	3.40%
	Electronics			
200,000	International Telephone & Telegraph Corp.	$ 8,443,207	$ 11,000,000	.38%
	Finance Companies			
217,900	Beneficial Finance Co.	$ 7,734,775	$ 13,182,950	.46%
300,000	C.I.T. Financial Corp.	12,155,658	9,412,500	.32
240,000	Commercial Credit Co.	10,688,323	8,400,000	.29
160,000	Household Finance Corp.	5,958,597	10,680,000	.37
		$ 36,537,353	$ 41,675,450	1.44%
	Foods and Beverages			
350,000	Borden Co.	$ 8,077,764	$ 15,750,000	.54%
377,000	California Packing Corp.	2,064,811	10,367,500	.36
240,000	Campbell Soup Co.	6,891,840	8,430,000	.29
130,000(e)	Continental Baking Co.	6,437,254	6,435,000	.22
167,000	General Foods Corp.	7,515,362	13,902,750	.48
212,000	Standard Brands, Inc.	11,062,665	16,430,000	.57
400,000	Unilever N. V. Fl. 20	14,532,642	14,900,000	.52
		$ 56,582,338	$ 86,215,250	2.98%
	Non-Ferrous Metals			
185,000	The International Nickel Co. of Canada, Ltd.	$ 7,379,183	$ 17,020,000	.59%
615,919(b,c)	Kaiser (Henry J.) & Co. (Warrants)	106,499	505,908	.02
100,000	Phelps Dodge Corp.	6,800,419	7,262,500	.25
		$ 14,286,101	$ 24,788,408	.86%
	Oil and Gas			
151,800	Cities Service Co.	$ 9,340,852	$ 13,054,800	.45%
250,000	Continental Oil Co. (Del.)	10,479,610	19,593,750	.68
294,300	Gulf Oil Corp.	7,297,171	17,142,975	.59
447,300	Marathon Oil Co.	16,447,739	27,564,863	.95
260,000	Phillips Petroleum Co.	8,677,739	14,267,500	.49
792,000	Royal Dutch Petroleum Co.	26,232,045	32,967,000	1.14
337,600	Shell Oil Co.	6,709,317	22,534,800	.78
490,000	Socony Mobil Oil Co., Inc.	33,723,123	43,120,000	1.49
449,200	Standard Oil Co. (Indiana)	10,199,697	21,505,450	.74
1,000,000	Standard Oil Co. (New Jersey)	59,116,918	78,500,000	2.71
787,500	Texaco, Inc.	22,813,050	65,953,125	2.28
		$ 211,037,261	$ 356,204,263	12.30%

SCHEDULE 1

INVESTORS MUTUAL, INC.
Investments in Securities, Continued

(continued)

COMMON STOCKS (Continued)

SHARES	NAME OF ISSUER AND TITLE OF ISSUE	COST	MARKET VALUE (a)	PERCENTAGE OF TOTAL MARKET VALUE
	Paper			
235,000	Container Corp. of America	$ 4,442,442	$ 7,990,000	.28%
170,000	Kimberly-Clark Corp.	7,268,116	8,861,250	.30
		$ 11,710,558	$ 16,851,250	.58%
	Railroads			
278,200	Denver & Rio Grande Western R.R. Co.	$ 4,872,281	$ 5,668,325	.20%
80,400	Norfolk & Western Ry. Co.	6,716,402	9,899,250	.34
200,000	Northern Pacific Ry. Co.	8,838,700	9,875,000	.34
150,000	Seaboard Air Line R.R. Co.	4,749,464	6,431,250	.23
384,800	Southern Pacific Co.	7,915,467	15,969,200	.55
160,000	Southern Ry. Co.	7,135,118	9,060,000	.31
115,000	Union Pacific R.R. Co.	3,223,035	4,729,375	.16
		$ 43,450,467	$ 61,632,400	2.13%
	Retail Trade			
277,400	Associated Dry Goods Corp.	$ 6,368,416	$ 16,009,200	.56%
268,000	Federated Dept. Stores, Inc.	4,689,621	17,855,500	.62
225,000	Great Atlantic & Pacific Tea Co.	9,246,482	8,521,875	.29
130,000	Macy (R.H.) & Co.	4,473,782	6,532,500	.23
275,000	Montgomery Ward & Co.	10,474,957	9,693,750	.33
210,000	J. C. Penney Co., Inc.	9,663,387	14,122,500	.49
250,000	Safeway Stores, Inc.	6,308,391	8,156,250	.28
181,300	Sears, Roebuck & Co.	12,000,026	11,625,863	.40
		$ 63,225,062	$ 92,597,438	3.20%
	Rubber			
214,000	Firestone Tire & Rubber Co.	$ 5,168,495	$ 9,416,000	.33%
448,000	Goodyear Tire & Rubber Co.	8,695,699	22,064,000	.76
		$ 13,864,194	$ 31,480,000	1.09%
	Steel			
385,600	Armco Steel Corp.	$ 21,598,041	$ 26,124,400	.90%
450,000	Bethlehem Steel Corp.	14,542,528	16,931,250	.58
275,000	Inland Steel Co.	10,888,049	12,650,000	.44
175,800	U.S. Steel Corp.	9,668,578	8,636,175	.30
		$ 56,697,196	$ 64,341,825	2.22%
	Textiles and Apparel			
341,000	Burlington Industries	$ 10,153,876	$ 13,171,125	.45%
	Utilities—Natural Gas			
380,000	Arkansas Louisiana Gas Co.	$ 3,990,000	$ 15,960,000	.55%
360,000	Columbia Gas System, Inc.	10,001,713	10,845,000	.38
189,000	Northern Natural Gas Co.	3,786,003	11,812,500	.41
231,300	Pacific Lighting Corp.	6,968,286	6,592,050	.23
412,700	Panhandle Eastern Pipe Line Co.	9,875,935	15,992,125	.55
211,000	Peoples Gas, Light & Coke Co.	5,456,988	9,811,500	.34
438,900	Transcontinental Gas Pipe Line Corp.	6,874,640	10,533,600	.36
		$ 46,953,565	$ 81,546,775	2.82%

SCHEDULE 1

INVESTORS MUTUAL, INC.
Investments in Securities, Continued

(continued)

COMMON STOCKS (Continued)

SHARES	NAME OF ISSUER AND TITLE OF ISSUE	COST	MARKET VALUE (a)	PERCENTAGE OF TOTAL MARKET VALUE
	Utilities—Power and Light			
170,000	American Electric Power Co.	$ 3,562,009	$ 7,310,000	.25%
210,000	Central & South West Corp.	5,888,720	10,080,000	.35
300,000	Cleveland Electric Illuminating Co.	7,442,313	13,012,500	.45
250,000	Columbus & Southern Ohio Electric Co.	4,773,730	10,718,750	.37
240,000	Consolidated Edison Co. of N.Y., Inc.	10,981,010	10,560,000	.36
220,500	Florida Power Corp.	2,766,004	10,032,750	.35
243,900	Houston Lighting & Power Co.	9,477,496	13,353,525	.46
200,000	Kansas Gas & Electric Co.	3,553,593	7,400,000	.26
226,000	Long Island Lighting Co.	3,837,908	7,514,500	.26
250,000	Middle South Utilities, Inc.	9,702,606	13,437,500	.47
300,000	Montana Power Co.	3,471,234	11,700,000	.40
192,600	New York State Electric & Gas Corp.	3,930,629	8,715,150	.30
400,000	Niagara Mohawk Power Co.	11,303,933	10,850,000	.37
287,500	Northern States Power Co. (Minn.)	4,989,411	10,637,500	.37
453,900	Oklahoma Gas & Electric Co.	5,999,111	13,276,575	.46
250,000	Public Service Electric & Gas Co.	6,862,176	10,000,000	.35
200,000	Southern Co.	4,056,032	13,950,000	.48
225,000	Texas Utilities Co.	3,886,725	14,596,875	.50
250,000	Toledo Edison Co.	4,489,197	9,593,750	.33
160,000	Virginia Electric & Power Co.	1,134,803	7,520,000	.26
		$ 112,108,640	$ 214,259,375	7.40%
	Utilities—Other			
377,000	American Telephone & Telegraph Co.	$ 20,268,815	$ 25,447,500	.88%
320,000	American Water Works Co.	1,634,217	6,000,000	.21
943,500	General Telephone and Electronics Corp.	16,316,444	41,749,875	1.44
		$ 38,219,476	$ 73,197,375	2.53%
	Not Classified			
210,100	Columbia Broadcasting Systems, Inc.	$ 4,958,860	$ 8,141,375	.28%
115,600	Eastman Kodak Co.	1,091,075	11,646,700	.40
174,000	General American Transportation Corp.	4,522,953	6,699,000	.23
400,000	Gillette Co.	6,035,841	15,550,000	.54
150,000	North American Car Corp.	765,309	4,200,000	.15
790,800	Other	43,136,552	44,420,850	1.53
		$ 60,510,590	$ 90,657,925	3.13%
	Total common stocks	$1,161,531,320	$1,847,441,260	63.81%
	SUMMARY—COMMON STOCKS			
	Affiliated company (note e)	$ 6,437,254	$ 6,435,000	.22%
	Other	1,155,094,066	1,841,006,260	63.59
	Total, as above	$1,161,531,320	$1,847,441,260	63.81%

SCHEDULE I

INVESTORS MUTUAL, INC.
Investments in Securities, Continued
(continued)

PREFERRED STOCKS

SHARES	NAME OF ISSUER AND TITLE OF ISSUE	COST	MARKET VALUE (a)	PERCENTAGE OF TOTAL MARKET VALUE
	Commercial Finance			
9,000(b)	Talcott (James), Inc., 6¼% Cum.	$ 450,000	$ 468,000	.02%
	Consumer Credit			
10,000(b)	American Credit Corp., 5.50% Cum., Series of 1955 S.F.	$ 250,000	$ 231,250	.01%
20,800(b)	American Credit Corp., 6¼% Cum.	520,000	546,000	.02
60,000(b)	American Credit Corp., 6⅜%	1,500,000	1,582,500	.05
6,700	American Investment Co., 5¼% Cum. Prior	670,000	683,400	.02
66,672(b)	Continental Commercial Corp., 6½% Cum.	666,720	683,388	.02
5,500(b)	General Acceptance Corp., $5.00 Cum.	544,500	539,688	.02
30,000(b)	General Acceptance Corp., 5.25% Series B. Cum.	3,000,000	2,970,000	.10
5,960(b)	General Acceptance Corp., $6.00 Series Voting Preference	596,000	598,980	.02
16,500(b)	General Acceptance Corp., 6¼% Cum. S.F.	1,650,000	1,732,500	.06
8,800(b)	Interstate Securities Co., 5¼% Cum.	880,000	866,800	.03
3,998(b)	Interstate Securities Co., 6½% Cum.	399,900	406,398	.02
10,000(b)	Pioneer Finance Co., 6¼% Cum.	1,000,000	1,046,250	.04
23,342(b)	Seaboard Finance Co., $5.00 S.F.	2,327,130	2,316,694	.08
8,572(b)	Securities Investment Co. of St. Louis, Mo., 5½% Cum. S.F.	857,200	848,628	.03
		$ 14,861,450	$ 15,072,476	.52%
	Industrial			
4,900	Allied Stores Corp., 4% Cum.	$ 448,185	$ 444,675	.02%
3,437(b)	American Machine & Foundry Co., 5% Cum.	343,700	350,574	.01
65,000	American Sugar Co., 5.44%	876,757	853,125	.03
11,700	Ashland Oil & Refining Co., $5.00 Cum.	1,115,115	1,158,300	.04
12,850	Carrier Corp., 4½% Cum.	472,535	628,044	.02
20,000	Celanese Corp. of America, 4½% Cum.	2,010,914	1,895,000	.06
7,320	Food Fair Stores, Inc., $4.20 Cum., Series 1951	732,000	710,040	.02
10,000	Glatfelter (P.H.) Co., 4⅜% Cum., Series of 1955	486,840	470,000	.02
7,925	Houdaille Industries, Inc., $2.25 Cum.	364,070	345,728	.01
22,000(b)	Hudson Pulp & Paper Corp., 5.70% Cum. Series C	550,000	550,000	.02
39,200(b)	Hudson Pulp & Paper Corp., 6¼% Cum. Series D	980,000	980,000	.03
5,000	Hunt Foods and Industries, Inc., 5% Cum. Series A	437,500	485,000	.02
5,000	Interchemical Corp., 4½% Cum.	439,964	497,500	.02
5,000	International Minerals & Chemicals Corp., 4% Cum.	439,751	437,500	.02
17,500	Kaiser Steel Corp., $1.46 Cum.	727,475	923,438	.03
40,000(b)	Kaiser Steel Corp., 5¾% Cum. Conv.	4,000,000	4,080,000	.14
13,402(b)	Libby, McNeill & Libby, 5¼% Cum.	1,340,200	1,340,200	.04
3,000(c)	Pittsburgh Steel Co., 5½% Cum. Prior 1st Series	237,862	252,000	.01
16,770(b)	Weatherhead Co., $5.75 Cum.	1,677,000	1,677,000	.06
		$ 17,679,868	$ 18,078,124	.62%

SCHEDULE 1

(continued)

INVESTORS MUTUAL, INC.
Investments in Securities, Continued

PREFERRED STOCKS (Continued)

SHARES	NAME OF ISSUER AND TITLE OF ISSUE	COST	MARKET VALUE (a)	PERCENTAGE OF TOTAL MARKET VALUE
	Utilities—Power and Light			
6,580	Appalachian Power Co., 4½% Cum.	$ 735,859	$ 621,810	.02%
20,000	Arizona Public Service Co., $2.40 Cum. Series A	1,000,000	1,010,000	.03
13,364(b)	Arkansas-Missouri Power Co., 4.65% Cum.	1,336,400	1,323,036	.05
6,950(b)	Black Hills Power & Light Co., 4.75%	695,000	695,000	.02
6,533(b)	Black Hills Power & Light Co., 5.65% Cum.	653,300	692,498	.02
12,000	Carolina Power & Light Co., $5.00 Cum.	1,297,270	1,275,000	.04
1,185	Central Illinois Public Service Co., 4.92% Cum.	120,277	120,870	.01
13,600(b)	Central Louisiana Electric Co., 4.50% Cum., Series of 1955	1,360,000	1,315,800	.05
14,500(b)	Central Louisiana Electric Co., 5⅛% Series of 1958	1,450,000	1,520,688	.05
5,700	Columbus & Southern Ohio Electric Co., 4¼% Cum.	616,328	521,550	.02
20,000(b)	Consolidated Edison Co. of New York, Inc., 5¼% Cum.	2,000,000	2,145,000	.07
80,000(b)	Consolidated Edison Co. of New York, Inc., 5¾% Cum. Ser. A	8,000,000	8,620,000	.30
3,660	Empire District Electric Co., 4½% Cum.	369,000	362,340	.01
1,320	Empire District Electric Co., 5% Cum.	134,504	132,000	.01
20,000	Fall River Electric Light Co., 5.80% Cum.	1,990,000	2,164,200	.07
10,000(b)	Florida Power Corp., 4¾% Cum.	1,000,000	1,000,000	.03
15,000	Georgia Power Co., 4.92% Cum.	1,537,500	1,545,000	.05
9,073(b)	Green Mountain Power Corp., 5% Cum. Class A	907,300	920,910	.03
10,000(b)	Indianapolis Power & Light Co., 4.60% Cum.	1,000,000	990,000	.03
10,000(b)	Kansas Power & Light Co., 4½% Cum.	1,000,000	910,000	.03
9,800	Kentucky Utilities Co., 4¾% Cum.	989,800	967,750	.03
8,000	Long Island Lighting Co., 5% Cum. Series B	800,000	824,000	.03
6,000	Louisiana Power & Light Co., 4.96% Cum.	601,200	615,000	.02
10,000	Louisiana Power & Light Co., 5.16% Cum.	985,973	1,042,500	.04
10,100	Montana-Dakota Utilities Co., 4.50% Cum.	964,082	939,300	.03
11,300	Montana-Dakota Utilities Co., 4.70% Cum.	1,100,798	1,118,700	.04
16,300	Narragansett Electric Co., 4.64% Cum.	833,338	815,000	.03
7,500	New England Power Co., 4.60% Cum.	743,003	735,000	.03
5,075	New Orleans Public Service, Inc., 4¾% Cum.	542,271	504,963	.02
6,340	Northern Indiana Public Service Co., 4¼% Cum.	582,534	564,260	.02
10,000	Northern States Power Co., (Minn.) $4.16 Cum.	987,705	912,500	.03
9,100(b)	Northwestern Public Service Co., 5¼% Cum.	910,000	937,300	.03
10,000(b)	Orange & Rockland Utilities, Inc., 4.75% Cum. Series B	1,000,000	1,000,000	.03
7,684	Otter Tail Power Co., $4.40 Cum.	760,788	722,296	.03
73,850	Pacific Gas & Electric Co., 5% Cum. Redeemable 1st Plain	1,956,759	1,947,794	.07
16,150	Pacific Gas & Electric Co., 5% Cum. Redeemable 1st Series A	466,482	429,994	.01
6,508	Potomac Edison Co., 4.70% Cum. B	683,653	644,292	.02
20,000	Potomac Electric Power Co., $2.46 Cum., Series of 1958	1,000,000	1,025,000	.03
7,505	Public Service Co. of New Hampshire, 3.35% Cum.	533,135	529,103	.02
15,000	Public Service Co., of New Hampshire, 4.50% Div. Series Cum.	1,500,000	1,410,000	.05
5,000	Rochester Gas & Electric Corp., 4¼% Cum., Series I	500,000	497,500	.02
4,500	San Diego Gas & Electric Co., 5% Cum.	107,875	94,500	.01
16,463	South Carolina Electric & Gas Co., 4.50% Cum.	805,255	775,819	.03
4,400	South Carolina Electric & Gas Co., 5% Cum.	228,492	228,800	.01
1,670	Texas Electric Service Co., $4.56 Cum.	184,535	161,155	.01

SCHEDULE 1

INVESTORS MUTUAL, INC.
Investments in Securities, Continued

(continued)

PREFERRED STOCKS (Continued)

SHARES	NAME OF ISSUER AND TITLE OF ISSUE	COST	MARKET VALUE (a)	PERCENTAGE OF TOTAL MARKET VALUE
	Utilities—Power and Light, continued			
7,400	Texas Power & Light Co., $4.56 Cum.	$ 832,834	$ 712,250	.03%
8,800	Texas Power & Light Co., $4.84 Cum.	878,152	893,200	.03
9,000	Wisconsin Power & Light Co., 4.76% Cum.	900,000	909,000	.03
		$ 49,581,402	$ 49,842,678	1.72%
	Utilities—Natural Gas			
4,300(b)	Atlanta Gas Light Co., 4.60% Cum.	$ 430,000	$ 408,500	.01%
12,600	Colorado Interstate Gas Co., 5% Series Cum.	1,194,773	1,272,600	.04
25,000(b)	El Paso Natural Gas Co., 4⅞% Conv. 2nd	2,500,000	2,437,500	.08
7,423	El Paso Natural Gas Co., 5.36% Cum.	742,300	749,723	.03
5,472	El Paso Natural Gas Co., 5.50% Cum.	558,144	558,144	.02
24,800	El Paso Natural Gas Co., 5.50% Cum., 1956 Series	2,463,132	2,560,600	.09
6,800	El Paso Natural Gas Co., 5.65% Cum.	680,000	700,400	.02
18,355	El Paso Natural Gas Co., 6.40% Cum., 2nd Series 1957	1,835,500	1,927,275	.07
6,500(b)	Kansas-Nebraska Natural Gas Co., Inc., 5.65% Series Cum.	650,000	674,000	.02
52,300	Laclede Gas Co., 5% Cum. Series B	1,307,500	1,327,113	.05
78,374(b)	Lowell Gas Co., 5¼% Cum.	1,959,350	2,008,334	.07
29,128(b)	Lowell Gas Co., 5.40% Cum.	728,200	757,328	.03
7,000(b)	Michigan Gas Utilities Co., 5% Series A Cum.	700,000	700,000	.02
20,000	Natural Gas Pipeline Co. of America, 5½%	2,000,000	2,111,651	.07
9,600	Northern Illinois Gas Co., 5% Cum.	969,600	996,000	.03
3,625	Northern Natural Gas Co., 5½% Cum.	362,500	371,641	.01
46,259	Northern Natural Gas Co., 5.60% Cum.	4,625,900	4,875,417	.17
17,100	Northern Natural Gas Co., 5.80% Cum.	1,710,000	1,831,003	.06
7,608	Oklahoma Natural Gas Co., 4¾% Cum. A	417,264	378,498	.01
18,400	Pacific Lighting Corp., $4.40 Cum.	1,849,481	1,720,400	.06
40,000(b)	Piedmont Natural Gas Co., 5%	4,000,000	4,000,000	.14
18,000(b)	Piedmont Natural Gas Co., 5.50% Series Cum.	1,800,000	1,867,500	.06
2,388	Southern Union Gas Co., 4¼% Cum.	216,944	212,532	.01
4,315	Southern Union Gas Co., 5% Cum.	431,500	427,185	.02
28,300(b)	Southern Union Gas Co., 5.05% Cum.	2,830,000	2,921,975	.10
7,200	Southern Union Gas Co., 5.35% Cum.	720,000	734,400	.03
23,000(b)	Tenneco Corp., 6% 1st	2,300,000	2,394,875	.08
13,800	Tennessee Gas Transmission Co., 4.60% Cum.	1,458,340	1,359,300	.05
10,000	Tennessee Gas Transmission Co., 4.64% Cum.	1,031,000	985,000	.03
2,400	Tennessee Gas Transmission Co., 4.65% Cum.	228,177	236,400	.01
25,575	Tennessee Gas Transmission Co., 4.72% Cum. Conv. 2nd	2,557,500	2,506,350	.09
16,000	Tennessee Gas Transmission Co., 5.04% Cum.	1,600,000	1,616,000	.06
27,100	Tennessee Gas Transmission Co., 5.08% Cum.	2,710,000	2,737,100	.09
9,300	Tennessee Gas Transmission Co., 5.12% Cum.	933,488	939,300	.03
47,000	Tennessee Gas Transmission Co., 5.24% Cum.	4,700,000	4,770,500	.16
9,000	Tennessee Gas Transmission Co., 5.25% Cum.	900,000	909,000	.03
20,000(b)	Texas Eastern Transmission Corp., 5% 1964 Series	2,000,000	2,000,000	.07
60,000(b)	Texas Eastern Transmission Corp., 5% Cum., 2nd 1964 Series	6,000,000	6,000,000	.21
30,000	Texas Eastern Transmission Corp., 5.52%	3,000,000	3,090,000	.11
49,200	Texas Eastern Transmission Corp., 5.60% Series Cum.	4,916,600	5,067,600	.18

SCHEDULE 1

INVESTORS MUTUAL, INC.
Investments in Securities, Continued

(continued)

PREFERRED STOCKS (Continued)

SHARES	NAME OF ISSUER AND TITLE OF ISSUE	COST	MARKET VALUE (a)	PERCENTAGE OF TOTAL MARKET VALUE
	Utilities—Natural Gas, continued			
9,700	Texas Eastern Transmission Corp., 6.70% Series Cum.	$ 970,000	$ 1,028,200	.04%
6,614	Texas Gas Transmission Corp., 5.40% Cum.	661,400	676,771	.02
16,600	Transcontinental Gas Pipe Line Corp., $4.90 Cum.	1,654,375	1,655,850	.06
80,000(b)	Transcontinental Gas Pipe Line Corp., $5.00 Cum.	8,000,000	8,000,000	.28
20,000	Transcontinental Gas Pipe Line Corp., $5.26 Cum.	2,000,000	2,060,000	.07
71,162	Transcontinental Gas Pipe Line Corp., $5.60 Cum.	7,117,500	7,454,220	.26
2,500	Washington Gas Light Co., $4.25 Cum.	253,012	220,000	.01
9,333(b)	Western Gas Service Co., 6% Cum. Series A	933,300	977,632	.03
		$ 93,606,780	$ 95,213,817	3.29%
	Utilities—Communications and Water			
8,400(b)	Alexandria Water Co., 5.05% Cum.	$ 840,000	$ 873,600	.03%
28,000(b)	California Interstate Telephone Co., 5.25% Series Cum.	560,000	574,000	.02
7,125(b)	Commonwealth Water Co., 5¼% 1st Series of 1958	712,500	749,906	.03
20,000(b)	General Waterworks Corp., 6% Cum.	2,000,000	2,095,000	.07
12,900(b)	Hackensack Water Co., 5% Series Cum.	1,290,000	1,354,500	.05
5,800	Pennsylvania Gas & Water Co., 4.10% Cum.	481,971	501,700	.02
13,000(b)	St. Louis County Water Co., 4.50% Cum. Series A	1,300,000	1,170,000	.04
7,481(b)	South Pittsburgh Water Co., 4.70% Cum.	748,100	725,657	.02
8,800(b)	South Pittsburgh Water Co., 5¼% Cum.	880,000	926,200	.03
		$ 8,812,571	$ 8,970,563	.31%
	Railroads			
10,000	Carolina, Clinchfield and Ohio Ry., 5% Gtd.	$ 958,222	$ 1,047,500	.04%
12,000	Cleveland & Pittsburgh R. R. Co., 7% Reg. Gtd.	829,576	861,000	.03
31,800	Kansas City Southern Industries, Inc., 4% Non-Cum.	571,372	667,800	.02
79,500	Southern Ry. Co., 5% Non-Cum.	1,425,619	1,599,938	.05
5,800	Wabash R. R. Co., 4½% Cum.	400,383	548,825	.02
13,508	Wheeling & Lake Erie Ry. Co., $5.75 Gtd.	1,558,445	1,637,845	.06
		$ 5,743,617	$ 6,362,908	.22%
	Total preferred stocks	$ 190,735,688	$ 194,008,566	6.70%

SCHEDULE 1

INVESTORS MUTUAL, INC.
Investments in Securities, Continued

(continued)

PRINCIPAL AMOUNT	NAME OF ISSUER AND TITLE OF ISSUE	COST	MARKET VALUE (a)	PERCENTAGE OF TOTAL MARKET VALUE
BONDS				
	Commercial Finance			
$ 900,000(b)	A. J. Armstrong Co., Inc., 5⅜% Sub. Notes, 2/1/74	$ 900,000	$ 909,000	.03%
1,700,000(b)	A. J. Armstrong Co., Inc., 5¾% Jr. Sub. Notes, 11/1/77	1,700,000	1,712,750	.06
1,200,000(b)	A. J. Armstrong Co., Inc., 6⅛% Jr. Sub. Notes, 3/1/74	1,200,000	1,225,500	.04
700,000(b)	Civic Finance Corp., 6½% Senior Note, 5/1/72	703,500	731,500	.03
2,000,000(b)	Commercial Discount Corp., 5½% Sr. Note, 12/1/75	2,000,000	2,045,000	.07
1,200,000(b)	Commercial Discount Corp., 5⅜% Jr. Sub. Note, 3/1/75	1,200,000	1,200,000	.04
3,500,000(b)	Crompton-Richmond Co., Inc. Factors, 5½% Sr. Sub. Notes, 8/1/78	3,500,000	3,500,000	.12
1,920,000(b)	Heller (Walter E.) & Co., 4⅛% Sr. Notes, 7/1/71	1,920,000	1,891,200	.07
3,250,000(b)	Heller (Walter E.) & Co., 4⅛% Sr. Notes, 4/1/79	3,250,000	3,221,563	.11
540,000(b)	Heller (Walter E.) & Co., 5% Jr. Sub. Notes, 4/1/71	540,000	533,925	.02
640,000(b)	Heller (Walter E.) & Co., 5¼% Sr. Deb., 4/1/73	640,000	646,400	.02
1,575,000(b)	Heller (Walter E.) & Co., 5¼% Sub. Notes, 5/1/76	1,575,000	1,575,000	.05
2,000,000(b)	Heller (Walter E.) & Co., 5¼% Sub. Notes, 4/1/77	2,000,000	2,000,000	.07
2,700,000(b)	Heller (Walter E.) & Co., 5⅛% Sr. Deb., 2/1/74	2,700,000	2,743,875	.10
1,125,000(b)	Heller (Walter E.) & Co., 5⅜% Jr. Sub. Notes, 5/1/76	1,125,000	1,132,031	.04
1,750,000(b)	Heller (Walter E.) & Co., 5⅜% Jr. Sub. Notes, 4/1/77	1,750,000	1,763,125	.06
320,000(b)	Heller (Walter E.) & Co., 5¼% Sub. Notes, 4/1/73	320,000	326,000	.01
3,500,000(b)	Mack Financial Corp., 5¾% Prom. Note, 6/1/72	3,500,000	3,574,375	.12
3,500,000(b)	Mercantile Financial Corp., 5% Sr. Notes, 6/1/72	3,500,000	3,434,375	.12
1,000,000(b)	Mercantile Financial Corp., 5⅜% Sr. Sub. Notes, 2/1/80	1,000,000	981,250	.03
900,000(b)	Mercantile Financial Corp., 5¼% Sr. Notes, 10/1/73	900,000	913,500	.03
150,000(b)	Talcott (James), Inc., 5¼% Cap. Notes Series A, 4/1/66	150,000	149,813	.01
1,500,000(b)	Talcott (James), Inc., 5.20% Sub. Notes, 4/1/77	1,500,000	1,496,250	.05
1,750,000(b)	Talcott (James), Inc., 5½% Cap. Note, 4/1/77	1,750,000	1,750,000	.06
2,700,000(b)	Talcott (James), Inc., 5⅜% Cap. Notes, 12/1/75	2,673,000	2,750,625	.10
2,500,000(b)	Talcott (James), Inc., 5⅜% Cap. Notes, 10/1/76	2,500,000	2,550,000	.09
400,000(b)	Talcott (James), Inc., 6% Cap. Notes Series B, 4/1/69	400,000	405,500	.01
		$ 44,896,500	$ 45,162,557	1.56%
	Consumer Credit			
$ 750,000(b)	Acceptance Finance Corp., 6% Jr. Sub. Note, 1/15/78	$ 750,000	$ 750,000	.03%
600,000(b)	American Credit Corp., 5% Prom. Note, 7/1/71	600,000	600,000	.02
1,500,000(b)	American Credit Corp., 5½% Jr. Sub. Notes, 4/1/78	1,500,000	1,488,750	.05
1,050,000(b)	American Credit Corp., 5.90% Cap. Deb. Series D, 8/1/72	1,050,000	1,060,500	.04
100,000(b)	American Credit Corp., 6% Cap. Deb. B, 8/1/70	100,000	100,500	.01
214,000(b)	American Investment Co., 3⅞% Notes, 10/1/66	211,860	212,395	.01
3,400,000(b)	American Investment Co., 4¼% Prom. Notes, 6/1/71	3,400,000	3,344,750	.12
2,000,000(b)	American Investment Co., 5% Sub. Note, 6/1/84	2,000,000	1,975,000	.07
2,250,000(b)	American Investment Co., 5¼% Cap. Notes, 6/1/84	2,250,000	2,221,875	.08

SCHEDULE 1

INVESTORS MUTUAL, INC.
Investments in Securities, Continued

(continued)

BONDS (Continued)

PRINCIPAL AMOUNT	NAME OF ISSUER AND TITLE OF ISSUE	COST	MARKET VALUE (a)	PERCENTAGE OF TOTAL MARKET VALUE
	Consumer Credit, continued			
$1,050,000(b)	American Investment Co., 5¾% Sub. Notes, 10/1/71	$ 1,050,000	$ 1,057,875	.04%
3,000,000(b)	American Investment Co., 5¾% Cap. Notes, 10/1/81	3,000,000	3,093,750	.11
1,000,000(b)	Associates Investment Co., 4¼% S. F. Prom. Note, 1/15/67	1,000,000	1,002,500	.03
2,700,000(b)	Atlas Financial Corp., 6% Serial Sub. Note, 6/1/66-74	2,700,000	2,713,500	.09
1,800,000(b)	Atlas Financial Corp., 6½% Serial Jr. Sub. Note, 6/1/66-74	1,800,000	1,809,000	.06
1,380,000(b)	Avco Delta Corp., 6⅛% Sr. Note Ser. F, 9/15/71	1,380,000	1,417,950	.05
200,000(b)	Bankers Investment Co., 5¾% Cap. Deb. Ser. A, 2/1/67	200,000	199,500	.01
700,000(b)	Bankers Investment Co., 6% Senior Notes, 12/1/71	700,000	717,500	.02
350,000(b)	Bankers Investment Co., 6¼% Senior Notes, 5/1/72	346,500	360,500	.01
5,000,000(b)	Beneficial Finance Co., 5⅜% Sub. Notes, 7/15/80	5,000,000	5,300,000	.18
5,000,000(b)	Capital Finance Corp., 4¾% Sr. Prom. Note, 5/1/72	5,000,000	4,968,750	.17
600,000(b)	Dial Finance Co., 5% Sr. Notes, 12/1/66	600,000	602,250	.02
1,000,000	Dial Finance Co., 6% Cap. Deb., 4/1/81	1,000,000	1,022,500	.04
1,500,000(b)	Family Finance Corp., 4½% Sr. Notes, 9/1/71	1,500,000	1,481,250	.05
3,000,000(b)	Family Finance Corp., 4¾% Sr. Sub. Notes, 5/1/83	3,000,000	2,880,000	.10
1,500,000(b)	Family Finance Corp., 5% Sr. Sub. Notes, 9/1/71	1,500,000	1,494,375	.05
1,200,000(b)	Family Finance Corp., 5½% Sr. Sub. Notes, 9/1/67	1,200,000	1,210,500	.04
2,700,000(b)	Family Finance Corp., 5½% Jr. Sub. Notes, 6/1/81	2,700,000	2,676,375	.09
5,000,000(b)	Federal Services Finance Corp., 5⅛% Senior Notes, 9/1/79	5,000,000	4,912,500	.17
170,000(b)	Fidelity Acceptance Corp., 6% Sr. Deb. Series C, 9/1/67	170,000	172,338	.01
5,000,000(b)	General Acceptance Corp., 4¾% Sr. Note, 12/1/68	5,000,000	4,987,500	.17
1,892,000	General Acceptance Corp., 4¾% Sr. Deb., 8/1/71	1,881,972	1,854,160	.06
1,000,000(b)	General Acceptance Corp., 5¼% Sr. Notes, 3/1/77	1,000,000	1,015,000	.04
3,000,000	General Acceptance Corp., 5½% Sr. Deb., 10/1/76	3,000,000	2,985,000	.10
3,550,000(b)	General Acceptance Corp., 5½% Jr. Sub. Notes, 8/1/79	3,550,000	3,518,938	.12
4,000,000(b)	General Acceptance Corp., 5⅜% Sr. Sub. Notes, 3/1/77	4,000,000	4,085,000	.14
851,000	General Acceptance Corp., 6% Sr. Deb., 1/1/80	851,000	859,510	.03
1,550,000(b)	General Finance Corp., 5¼% Cap. Notes, 10/1/83	1,550,000	1,520,938	.05
1,000,000(b)	General Finance Corp., 5¾% S.F. Cap. Notes, 12/1/65-80	971,100	1,016,250	.04
2,000,000(b)	Industrial Credit Co., St. Paul, Minn., 5% Sr. Note, 6/1/75	2,000,000	2,000,000	.07
2,000,000(b)	Industrial Finance & Thrift Corp., 5% Sr. Notes, 10/31/75	2,000,000	1,975,000	.07
1,906,300(b)	Industrial Finance & Thrift Corp., 5¾% Sr. Sub. Note, 9/30/77	1,906,300	1,918,214	.07
1,000,000(b)	Interstate Finance Corp., 6⅛% Jr. Sub. Note, 12/1/76	1,000,000	1,036,250	.04
664,000(b)	Interstate Securities Co., 6¼% Jr. Sub. Note, 7/1/73	664,000	667,320	.02
400,000(b)	ITT Aetna Finance Co., 5¼% Jr. Sub. Deb. Series A, 4/1/69	400,000	395,500	.01
1,500,000(b)	ITT Aetna Finance Co., 5½% Sr. S.F. Note, 11/1/66-75	1,500,000	1,535,625	.05
550,000(b)	Laurentide Finance Corp. of California, 5¼% Sr. Sub. Notes, 11/1/79	550,000	545,188	.02

SCHEDULE 1

INVESTORS MUTUAL, INC.
Investments in Securities, Continued

(continued)

BONDS (Continued)

PRINCIPAL AMOUNT	NAME OF ISSUER AND TITLE OF ISSUE	COST	MARKET VALUE (a)	PERCENTAGE OF TOTAL MARKET VALUE
	Consumer Credit, continued			
$ 400,000(b)	Laurentide Finance Corp. of California, 5⅜% Sr. Notes, 2/1/67	$ 400,000	$ 402,000	.01%
160,000(b)	Laurentide Finance Corp. of California, 5½% Ser. B, S.F. Deb., 8/1/66	160,000	160,400	.01
600,000(b)	Laurentide Finance Corp. of California, 5½% Jr. Sub. Notes, 11/1/79	600,000	594,750	.02
1,400,000(b)	Laurentide Finance Corp. of California, 6% Senior Notes, 5/1/72	1,400,000	1,443,750	.05
1,300,000(b)	Laurentide Finance Corp. of California, 6% Jr. Sub. Notes, 12/15/74	1,300,000	1,321,125	.05
7,000,000(b)	Liberty Loan Corp., 4⅛% Sr. Note, 11/15/68	7,000,000	6,982,500	.24
2,407,000(b)	Liberty Loan Corp., 5⅛% Sr. Note, 10/1/70	2,407,000	2,449,123	.08
2,325,000(b)	Modern Homes Finance Co., 6¼% Coll. Tr. Deb. Ser. A, 4/1/74	2,325,000	2,325,000	.08
150,000(b)	Mossler Acceptance Co., 4¾% Sub. Notes, 11/1/66	150,000	149,250	.01
2,000,000(b)	Murphy Finance Co., 5% Sr. Notes, 3/1/76	2,000,000	1,987,500	.07
1,000,000(b)	Murphy Finance Co., 5¾% Jr. Sub. Notes, 7/1/75	1,000,000	1,000,000	.03
3,000,000(b)	Pacific Finance Corp., 4⅜% Deb., 10/1/71, 1957 Issue	2,960,100	2,940,000	.10
4,000,000(b)	Pacific Finance Corp., 5½% Cap. Deb., 7/1/79	4,000,000	3,950,000	.14
6,000,000(b)	Pacific Finance Corp., 5¾% Cap. Deb., 12/1/81	6,000,000	6,052,500	.21
349,000(b)	Personal Industrial Bankers, Inc., 6% Sr. Deb. Ser. A, 8/1/68	349,000	348,128	.01
150,000(b)	Personal Industrial Bankers, Inc., 7% Sub. Deb., A, 8/1/68	150,000	151,125	.01
1,440,000(b)	Pioneer Finance Co., 5¼% Sr. S.F. Deb., 12/1/65-72	1,440,000	1,465,200	.05
1,620,000(b)	Pioneer Finance Co., 6½% Sub. Deb. Ser. E. 11/1/73	1,620,000	1,644,300	.06
1,500,000(b)	Public Loan Co., Inc., 4⅞% Sr. Notes, 8/28/68	1,500,000	1,496,250	.05
2,100,000(b)	Ritter Finance Co., 5½% Sr. Note, 8/1/72	2,100,000	2,128,875	.07
1,000,000(b)	Seaboard Finance Co., 5⅛% S.F. Notes, 12/1/66	1,000,000	1,003,750	.03
1,750,000(b)	Seaboard Finance Co., 6% Cap. Notes, 9/1/71	1,741,720	1,778,438	.06
1,000,000(b)	Seaboard Finance Co., 6⅛% Cap. Notes, 1/1/81	1,000,000	1,041,250	.04
900,000(b)	Seaboard Finance Co., 6½% Cap. Notes, 8/1/72	900,000	923,625	.03
1,558,000(b)	Securities Investment Co. of St. Louis, Mo., 4¼% S.F. Deb., 6/1/68	1,558,000	1,526,840	.05
5,000,000(b)	Southwestern Investment Co., 4¼% Sr. Notes, 5/1/72	5,000,000	4,975,000	.17
1,250,000(b)	Southwestern Investment Co., 5⅛% Sr. Sub. Notes, 5/1/79	1,250,000	1,250,000	.04
1,466,000(b)	State Loan & Finance Corp., 4¾% Prom. Note, 6/1/71	1,466,000	1,466,000	.05
2,000,000	State Loan & Finance Corp., 5¼% Cap. Deb., 6/1/83	1,939,800	1,900,000	.07
1,875,000(b)	State Loan & Finance Corp., 5½% Prom. Note, 4/1/72	1,875,000	1,926,563	.07
375,000(b)	Stephenson Finance Co., Inc., 5% Sub. Deb. Series A, 8/1/70	375,000	366,563	.01
338,000(b)	Stephenson Finance Co., Inc., 6¼% Sub. Deb. Ser. B, 9/1/74	338,000	343,493	.01
1,000,000(b)	Sun Finance & Loan Co., 5⅜% Sr. Sub. Notes, 12/1/78	1,000,000	1,000,000	.03
1,890,000(b)	Sun Finance & Loan Co., 6¼% Sub. Notes, 12/1/71	1,890,000	1,941,975	.07
3,000,000(b)	Texas Consumers Finance Corp., 5¾% Sr. Notes, 12/1/75	3,000,000	3,037,500	.10
200,000(b)	Thorp Finance Corp., 5% Cap. Notes Ser. A, 7/1/67	198,000	198,250	.01

SCHEDULE 1

INVESTORS MUTUAL, INC.
Investments in Securities, Continued

(continued)

BONDS (Continued)

PRINCIPAL AMOUNT	NAME OF ISSUER AND TITLE OF ISSUE	COST	MARKET VALUE (a)	PERCENTAGE OF TOTAL MARKET VALUE
	Consumer Credit, continued			
$1,000,000(b)	Thorp Finance Corp., 5¼% Sub. Notes, 11/1/78	$ 1,000,000	$ 982,500	.03%
400,000(b)	Thorp Finance Corp., 5½% Prom. Note, 3/1/67	400,000	402,500	.01
200,000(b)	Thorp Finance Corp., 5½% Cap. Notes Series B, 7/1/67	200,000	199,750	.01
875,000(b)	Thorp Finance Corp., 5¾% Sub. Notes, 5/1/71	875,000	885,938	.03
		$ 148,400,352	$ 148,903,787	5.14%
	Other Financial			
$2,000,000(b)	First Surety Corp., 5½% Sr. Notes, 6/1/75	$ 2,000,000	$ 1,950,000	.07%
1,600,000	Nacional Financiera S.A. Discount Note, 1/21/66-67	1,483,417	1,483,417	.05
2,250,000(b)	Northwestern Bank (North Wilkesboro, N.D.), 5% Sub. Note, 5/1/84	2,250,000	2,202,188	.08
500,000(b)	Ridgely, Inc., 4¾% Sec. Note, 5/1/66	500,000	500,000	.02
4,500,000(b)	United Financial Corp. of Calif., 5⅓% Sr. Notes, 4/1/75	4,500,000	4,449,375	.15
		$ 10,733,417	$ 10,584,980	.37%
	Industrial			
$1,336,000(b)	ACF Industries, Inc., 4¼% Equip. Tr., 12/15/65-68	$ 1,336,000	$ 1,332,660	.05%
6,720,000(b)	ACF Industries, Inc., 4.70% Equip. Tr., 6/15/66-79	6,720,000	6,636,000	.23
5,633,334(b)	Admiral Corp., 5.40% Prom. Note, 12/1/77	5,633,334	5,605,167	.19
2,750,000(b)	Admiral Corp., 5.40% Prom. Note, 9/30/79	2,722,142	2,732,813	.09
1,455,000(b)	Allied Supermarkets, Inc., 4¾% Prom. Note, 11/1/71	1,416,879	1,424,613	.05
822,000(b)	Allied Supermarkets, Inc., 5¼% Prom. Note, 11/2/71	822,000	819,975	.03
1,060,000	American Sugar Co., 5.30% Sub. Deb., 4/2/93	1,123,600	1,081,200	.04
2,320,000	Automatic Retailers of America, Inc., 4⅜% Sub. Deb., 3/1/83	2,151,228	2,180,800	.08
343,000(b)	Blackships, Inc., 5% Mtge. Bonds Series E, 10/1/73	343,000	345,490	.01
468,000(b)	Blackships, Inc., 5% Mtge. Bonds Series F, 10/1/73	468,000	471,398	.02
530,000(b)	Blackships, Inc., 5% Mtge. Bonds Series G, 7/1/74	530,000	533,848	.02
2,500,000(b)	Brunswick of Canada Ltd., 7⅛% Coll. Tr., 12/1/70	2,500,000	2,500,000	.09
11,700,000(b)	Celanese Corp. of America, 4¾% Prom. Note, 4/1/90	11,700,000	11,583,000	.40
5,000,000(b)	Coastal States Gas Producing Co., 5% 1st Mtge. Ser. B, 4/15/85	5,000,000	5,000,000	.17
1,688,000(b)	Colorado Fuel & Iron Corp., 5¾% 1st Mtge. & Coll. Trust Bonds, S.F. Series, 8/1/79	1,688,000	1,647,910	.07
9,200,000(b)	Cowles Magazine & Broadcasting, Inc., 4⅞% Prom. Note, 5/1/85	9,200,000	9,200,000	.32
3,000,000(b)	Diners Club, Inc., 5¼% Sr. Sub. Notes, 4/1/76	2,963,076	2,925,000	.10
10,000,000(b)	Dow Chemical Co., 4½% 25 Year Notes, 1/15/90	10,000,000	9,887,500	.34
1,218,000(b)	Home Oil Co., Ltd., 5½% Sec. Notes Series B, 9/1/71, with Warrants	1,218,000	1,202,775	.04
1,216,000(b)	Kaiser Aluminum & Chemical Corp., 4.93% 1st Mtge., 1/1/76	1,216,000	1,203,840	.04
1,400,000(b)	Kaiser Aluminum & Chemical Corp., 5¼% 1st Mtge., 11/1/94	1,389,528	1,359,750	.05
2,000,000(b)	Kaiser Cement & Gypsum Corp., 5⅛% Prom. Note, 12/1/81	2,000,000	2,000,000	.07
3,850,000(b)	Kaiser Steel Corp., 4¼% 1st Mtge., 5/1/76	3,850,000	3,633,438	.13
1,375,000(b)	Kaiser Steel Corp., 5½% 1st Mtge., 11/1/84	1,375,000	1,344,063	.05
5,760,000(b)	Kaiser Steel Corp., 5⅛% Prom. Note, 5/1/81	5,760,000	5,760,000	.20
3,450,250(b)	Mack Trucks, Inc., 5⅛% Sr. Notes, 5/1/76	3,406,432	3,471,814	.12

SCHEDULE 1

IVESTORS MUTUAL, INC.
vestments in Securities, Continued

(continued)

ONDS (Continued)

INCIPAL OUNT	NAME OF ISSUER AND TITLE OF ISSUE	COST	MARKET VALUE (a)	PERCENTAGE OF TOTAL MARKET VALUE
	dustrial, continued			
605,000(b)	Montgomery Ward & Co., Inc., 4⅞% Deb. 8/1/90	$ 9,570,422	$ 9,701,050	.33%
945,000(b)	North American Car Corp., 5⅛% Sub. S.F. Notes, 2/28/84	1,945,000	1,906,100	.07
256,415(b)	Panketrol, Ltd., 6¼% 1st Mtge. C. Gtd., 5/1/82	2,995,902	3,288,979	.11
418,000(b)	Peavey Co., 5¾% 1st Mtge., 6/30/73	2,418,000	2,436,135	.08
000,000(b)	Petroleos Mexicanos, 7% Coll. Notes, 8/1/72	9,930,000	10,000,000	.34
000,000(b)	Philadelphia & Reading Corp., 5⅜% Prom. Note, 3/31/82	10,000,000	10,125,000	.35
462,000(b)	Pittston Co. (The), 6⅛% 1st Mtge. S.F. Notes, 10/1/82	1,462,000	1,527,205	.05
018,000(b)	St. Lawrence Corp., Ltd., 1st Mtge., 4¾% S.F. Series B, 4/15/72	1,018,000	987,460	.03
000,000(b)	Siemens & Halske A.G., 5¾% Prom. Note, 5/1/77	9,825,000	10,000,000	.34
394,000(b)	Southwestern Nitrochemical Corp., 5¾% 1st Mtge., 9/1/72	394,000	394,000	.01
933,000(b)	Southwestern Nitrochemical Corp., 7% 1st Mtge., 9/1/72	933,000	960,990	.03
256,000(b)	Suburban Propane Gas Corp., 5% S.F. Deb., 1/1/69	256,000	256,000	.01
257,000(b)	Suburban Propane Gas Corp., 5⅛% S.F. Deb., 8/1/68	257,000	258,606	.01
500,000(b)	Texaco, Inc., 4½% Note, 12/15/89	6,500,000	6,418,750	.22
000,000(b)	United Airlines, Inc., 5% Notes, 5/1/85	25,000,000	25,000,000	.86
000,000	Victor Comptometer Corp., 4⅞% S.F. Deb., 4/15/88	2,988,750	2,880,000	.10
000,000(b)	Jim Walter Corp., 5¾% Senior Sub. Note, 6/1/80	10,000,000	9,912,500	.34
100,000	Western Union Telegraph Co., 5% S.F. Deb., 3/1/92	12,139,125	12,145,375	.42
840,000	Western Union Telegraph Co., 5¼% S.F. Deb., 2/1/87	5,923,550	5,971,400	.21
232,000(b)	26026 Corp., 5½% Leasehold 1st Mtge. S.F., 12/1/74	2,232,000	2,232,000	.08
		$ 202,319,968	$ 202,284,604	6.99%
	ilities			
820,000(b)	American Water Works Co., Inc., 5½% Coll. Tr., 5/1/86	$ 3,820,000	$ 4,001,450	.14%
493,000(b)	California Interstate Telephone Co., 4¼% 1st Mtge., 2/1/79	493,000	463,420	.02
147,000(b)	California Interstate Telephone Co., 4¼% S.F. Deb., 2/1/74	147,000	144,428	.01
000,000(b)	Consolidated Edison Co. of New York, 4.60% 1st & Ref. Mtge., Ser. BB, 10/15/94	25,000,000	24,812,500	.86
500,000(b)	El Paso Natural Gas Co., 5% 1st Mtge., 4/1/84	500,000	500,000	.02
400,000(b)	El Paso Natural Gas Co., 5¼% S.F. Debs., 4/1/84	1,400,000	1,415,750	.05
428,000(b)	El Paso Natural Gas Co., 5⅛% S.F. Debs., 5/1/79	1,428,000	1,451,205	.05
587,000(b)	El Paso Natural Gas Co., 5.50% 1st Mtge. Pipeline, 4/1/80	2,587,000	2,684,013	.09
986,000	Equitable Gas Co., 3⅛% S.F. Deb., 3/1/70	936,700	916,980	.03
967,000(b)	Florida Gas Transmission Co., 5½% 1st Mtge. Pipeline Bonds, 7/1/79	3,967,000	4,026,505	.14
024,000(b)	General Waterworks Corp., 5½% S.F. Deb., 6/1/81	2,024,000	2,046,770	.07
700,000(b)	Greenwich Water System, Inc., 6% Coll. Trust, 11/1/94	2,700,000	2,865,375	.10
000,000	Houston Corp., 5% Sub. Deb., 8/1/68	1,679,839	1,975,000	.07
200,000(b)	Houston Natural Gas Corp., 4.70% S.F. Deb., 2/15/66-8/15/85	24,200,000	24,200,000	.84

SCHEDULE 1

INVESTORS MUTUAL, INC. *(continued)*

Investments in Securities, Continued

BONDS (Continued)

PRINCIPAL AMOUNT	NAME OF ISSUER AND TITLE OF ISSUE	COST	MARKET VALUE (a)	PERCENTAGE OF TOTAL MARKET VALUE
	Utilities, continued			
$2,135,320(b)	Jamaica Water Supply Co., 5¼% S.F. Notes, 7/1/82	$ 2,135,320	$ 2,164,681	.09
2,609,000	Michigan Wisconsin Pipeline Co., 5⅜% 1st Mtge. Pipeline 6/1/80	2,663,058	2,739,450	.10
4,499,000	Midwestern Gas Trans. Co., 5⅜% 1st Mtge. Pipeline, 6/1/80	4,510,679	4,543,990	.16
777,000(b)	Northern Natural Gas Co., 1st Mtge. Pipeline Bonds, 4½% Series, 6/1/73	777,000	772,144	.03
7,500,000(b)	Northwest Natural Gas Co., 4⅜% S.F. Deb., 4/1/85	7,500,000	7,500,000	.26
5,000,000(b)	Northwest Natural Gas Co., 5% S.F. Deb., 6/1/82	5,000,000	5,043,750	.17
952,000	Northwest Natural Gas Co., 5⅛% 1st Mtge., 2/1/84	952,000	961,520	.03
10,000,000	Pacific Gas & Electric Co., 4½% 1st & Ref. Mtge., KK, 12/1/96	10,000,000	9,975,000	.34
619,000	Pioneer Natural Gas Co., 5½% S.F. Deb., 3/1/77	620,548	612,810	.02
4,000,000(b)	Portland General Electric Co., 4.70% 1st Mtge., 3/1/95	4,000,000	4,000,000	.14
1,327,000	Quebec Natural Gas Corp., 5¼% Sub. Deb., 4/1/85	967,524	1,134,585	.04
2,000,000(b)	Southeastern Michigan Gas Co., 5% S.F. Deb., 6/1/88	2,000,000	2,000,000	.07
919,000(b)	South Georgia Natural Gas Co., 4¼% 1st Mtge. Pipeline Bonds, 2/1/75	919,000	902,918	.03
5,000,000	Tenneco Corp., 5⅛% Deb., 4/1/90	5,067,000	4,975,000	.17
3,929,000	Tennessee Gas Transmission Co., 4¼% Deb., 9/1/74	4,007,580	3,870,065	.13
5,000,000	Tennessee Gas Transmission Co., 5% S.F. Deb., 4/1/82	5,050,000	4,925,000	.17
6,895,000	Tennessee Gas Transmission Co., 5% Deb., 12/1/84	6,893,375	6,722,625	.23
9,903,000	Tennessee Gas Transmission Co., 5⅛% S.F. Deb., 4/1/84	9,933,699	9,903,746	.34
5,630,000	Tennessee Gas Transmission Co., 5¼% Deb., 9/1/85	5,626,850	5,608,888	.19
2,092,000	Tennessee Gas Transmission Co., 5⅜% 1st Mtge. Pipeline Bonds, 1/1/79	2,096,620	2,112,920	.07
683,000	Texas Eastern Transmission Corp., 4⅜% 1st Mtge. Bonds, 3/1/77	679,903	662,510	.02
5,500,000	Texas Eastern Transmission Corp., 5% Deb., 10/1/83	5,500,000	5,390,000	.19
5,500,000	Texas Eastern Transmission Corp., 5% S.F. Deb., 5/1/84	5,500,625	5,335,000	.18
2,665,000	Texas Eastern Transmission Corp., 5⅛% Deb., 8/1/80	2,665,000	2,691,650	.09
1,670,000	Texas Eastern Transmission Corp., 5⅜% Deb., 8/1/81	1,655,404	1,682,525	.06
2,364,000	Texas Eastern Transmission Corp., 5½% Deb., 12/1/76	2,340,076	2,387,640	.08
1,645,000	Texas Eastern Transmission Corp., 5⅜% 1st Mtge. Pipeline Bonds, 9/1/77	1,727,250	1,669,675	.06
967,000	Texas Eastern Transmission Corp., 6% Deb., 6/1/77	956,995	986,340	.03
5,385,000	Texas Gas Transmission Corp., 4⅞% Deb., 8/1/84	5,385,000	5,358,075	.19
2,439,000	Transcontinental Gas Pipeline Corp., 4¾% 1st Mtge., 1/1/84	2,417,667	2,402,415	.08
4,780,000	Transcontinental Gas Pipeline Corp., 4⅞% 1st Mtge., 11/1/82	4,813,938	4,708,300	.16
3,563,000	Transcontinental Gas Pipeline Corp., 5% Ser., 1st Mtge. Pipeline Bonds, 8/1/79	3,556,794	3,554,093	.12
2,866,000	Transcontinental Gas Pipeline Corp., 5% Deb., 12/1/82	2,830,175	2,844,505	.10
630,000	Transcontinental Gas Pipeline Corp., 6¼% Deb., 5/1/78	626,850	648,900	.02

SCHEDULE 1

STORS MUTUAL, INC.
tments in Securities, Continued

(continued)

DS (Continued)

L	NAME OF ISSUER AND TITLE OF ISSUE	COST	MARKET VALUE (a)	PERCENTAGE OF TOTAL MARKET VALUE
..., continued				
00(b)	Trunkline Gas Co., 5¼% 1st Mtge. Pipeline, 11/1/79	$ 1,081,000	$ 1,110,728	.04%
00	Union Electric Co., 3⅜% 1st Mtge., 5/1/71	2,343,750	2,359,375	.08
00(b)	Washington Natural Gas Co., 5½% Ser. 1st Mtge., 4/1/77	1,230,000	1,299,188	.05
00(b)	Washington Natural Gas Co., 5½% 1st Mtge., 10/1/79	1,638,000	1,715,220	.06
00(b)	Washington Natural Gas Co., 5¾% S.F. Deb., 10/1/79	867,331	912,525	.03
00(b)	Washington Water Power Co., 4¼% Deb., 3/1/70-3/1/90	2,000,000	2,000,000	.07
00(b)	Westcoast Transmission Co., Ltd., 5½% Sub. Deb. Series B, 4/1/88	593,187	644,875	.02
00(b)	Wisconsin River Power Co., 2⅜% 1st Mtge., 8/1/77	5,160,066	5,156,100	.18
		$ 207,171,803	$ 207,492,127	7.17%
ds:				
00	Atlantic Coast Line R.R. Co., 4½% Equip. Tr. Series 5, 12/1/65-69	$ 1,126,942	$ 1,117,288	.04%
00	Baltimore & Ohio R.R. Co., 3⅜% 1st Consol. Mtge. A, 8/1/70	937,500	937,500	.03
00	Baltimore & Ohio R.R. Co., 4¼% 1st. Consol. Mtge. C, 10/1/95	1,705,100	1,657,458	.06
731(b)	Bangor & Arrostook Railroad Co., 4.80% Cond. Sales Equip. Oblig., 7/1/66-79	4,426,731	4,426,731	.15
00	Boston and Maine Railroad Co., Equipment Trust Series 1, 4½%, 3/1/66-71	860,354	715,950	.02
00	Boston and Maine Railroad Co., Equipment Trust Series 1, 6%, 3/1/66-71	581,722	502,313	.02
00	Chesapeake & Ohio Ry. Co., 4¼% Equip. Tr., 8/1/66-67	831,714	824,855	.03
584(b)	Chesapeake & Ohio Ry. Co., 4.70% Cond. Sales Equip. Oblig., 1970-79	4,547,584	4,485,055	.16
00	Chicago, Burlington & Quincy R.R. Co., 3⅛% Equip. Tr. No. 2 (1963), 12/1/65-12/1/66	361,175	356,850	.01
00	Chicago, Burlington & Quincy R.R. Co., 4% Equip. Tr. No. 3, 1/15/66-67	525,000	521,063	.02
00	Chicago & Eastern Illinois R.R. Co., 3¼% 1st Mtge. Series B, 5/1/85	905,850	841,500	.03
667(b)	Chicago & Eastern Illinois R.R. Co., 5% Note, 2/28/78	1,841,667	1,841,667	.06
000	Chicago & N.W. Ry. Co., 2nd Equip. Trust of 1958, 5½%, 10/15/67-73	770,000	796,950	.03
000(b)	Chicago & N.W. Ry. Co., 5¼% Equip. Oblig. S.A., 11/1/78	1,440,000	1,440,000	.05
000	Chicago, Rock Island & Pacific R.R. Co., 4¼% Equip. Tr. Ser. Y, 2/1/66-8/1/67	222,443	220,335	.01
000	Chicago, Rock Island & Pacific R.R. Co., 5½% 1st Mtge. Series C, 2/1/83	2,419,894	2,521,496	.08
000	Chicago, Terre Haute & Southeastern Ry. Co., 2¼%-4¼% Income Mtge., 1/1/94	896,908	843,173	.03
000	Chicago, Terre Haute & Southeastern Ry. Co., 2¼%-4¼% 1st & Ref. Mtge., 1/1/94	640,000	549,588	.02
000	Chicago Union Station Co., 3⅛% Sr. Deb. Ser. A, 6/1/66-67	3,976,860	3,940,000	.14

SCHEDULE 1

INVESTORS MUTUAL, INC.
Investments in Securities, Continued

(continued)

BONDS (Continued)

PRINCIPAL AMOUNT	NAME OF ISSUER AND TITLE OF ISSUE	COST	MARKET VALUE (a)	PERCENTAGE OF TOTAL MARKET VALUE
	Railroads, continued			
$ 775,000	Denver & Rio Grande Western R.R. Co., 4½% Income Series A, 1/1/2018	$ 614,672	$ 720,750	.03%
2,990,000(b)	Fruit Growers Express Co., 4.55% Equip. Tr., 3/15/70-74	2,990,000	2,990,000	.10
2,990,000(b)	Fruit Growers Express Co., 4.65% Equip. Tr., 3/15/75-79	2,990,000	2,990,000	.10
439,000	Great Northern Ry. Co., 4% 2nd Equip. Tr., 6/1/66-67	440,594	434,061	.02
2,000,000	Gulf, Mobile & Ohio R.R. Co., 4% Gen. Mtge. Inc. B, 1/1/2044	1,418,924	1,460,000	.05
210,000	Gulf, Mobile & Ohio R.R. Co., 4½% Equip. Tr. Series M, 8/1/67	210,064	208,425	.01
1,300,000	Gulf, Mobile & Ohio R.R. Co., 5% Income Deb. Series A, 12/1/2056	974,062	1,251,875	.04
2,653,933(b)	Louisiana & Arkansas Ry. Co., 4.60% Cert. of Int., 5/1/66-79	2,653,933	2,653,933	.09
359,000	Louisville & Nashville R.R. Co., 3⅛% Equip. Series FF, 6/1/66	360,253	356,756	.01
750,000	Louisville & Nashville R.R. Co., 4⅛% Equip. Tr. Series GG, 10/15/65-67	749,475	746,250	.03
2,235,000	Louisville & Nashville R.R. Co., 4½% Equip. Tr., 1/1/66-70	2,228,952	2,207,063	.07
944,000	Minneapolis, St. Paul & S. Ste. Marie R.R. Co., 4½% 1st Mtge. Series A, Cum. Inc., 1/1/71	872,258	883,820	.03
50,000	Missouri Pacific R.R. Co., 4% Equip. Tr. Ser. S., 11/1/65	50,234	49,875	.01
2,750,000	Missouri Pacific R.R. Co., 4¼% 1st Mtge. Series B, 1/1/90	1,583,532	2,375,313	.07
2,750,000	Missouri Pacific R.R. Co., 4¼% 1st Mtge. Series C, 1/1/2005	1,573,260	2,313,438	.07
800,000	Missouri Pacific R.R. Co., 4¼% Gen. Mtge. Income Series A, 1/1/2020	439,124	613,000	.02
1,073,000	Missouri Pacific R.R. Co., 4¼% Gen. Mtge. Income Series B, 1/1/2030	557,825	784,631	.03
1,090,000	New York, Chicago & St. Louis R.R. Co., 4⅛% Equip. Tr., 10/15/66-67	1,093,423	1,087,275	.04
3,000,000	New York, Chicago & St. Louis R.R. Co., 4½% Income Deb., 12/31/89	3,013,100	2,820,000	.10
120,000	Norfolk & Western Ry. Co., 4% Equip. Tr. Ser. E, 10/1/65	120,505	119,700	.01
258,000	Norfolk & Western Ry. Co., 4% Equip. Tr. Ser. J, 5/1/66-67	259,082	256,065	.01
900,000	Norfolk & Western Ry. Co., 4% Equip. Tr. Ser. K, 7/1/66-67	902,520	892,125	.03
900,000	Norfolk & Western Ry. Co., 4⅛% Equip. Tr. Ser. K, 7/1/66-67	897,907	893,250	.03
2,575,000	Norfolk & Western Ry. Co., 4⅛% Equip. Tr. Ser. L, 11/1/65-69	2,570,350	2,552,469	.09
2,280,000	Northern Pacific Ry. Co., 4⅛% Equip. Tr., 1/9/66-70	2,273,808	2,260,050	.07
8,773,674(b)	Pennsylvania R.R. Co., 4.60% Cond. Sales Equip. Oblig., 1/15/66	8,773,674	8,707,872	.30
2,947,259(b)	Pennsylvania R.R. Co., 4⅛% Cond. Sales Equip. Oblig., 3/1/70-9/1/72	2,947,259	2,910,418	.10

SCHEDULE 1

NVESTORS MUTUAL, INC.
ivestments in Securities, Continued

(continued)

INCIPAL MOUNT	NAME OF ISSUER AND TITLE OF ISSUE	COST	MARKET VALUE (a)	PERCENTAGE OF TOTAL MARKET VALUE
ONDS (Continued)				
ailroads, continued				
6,876,936(b)	Pennsylvania R.R. Co., 4¾% Cond. Sales Equip. Oblig., 3/1/73-9/1/79	$ 6,876,936	$ 6,730,801	.23%
9,999,980(b)	Pennsylvania R.R. Co., 4.75% Cond. Sales Equip. Oblig., 1965-1980	19,999,980	19,849,980	.69
1,500,000	Pennsylvania R.R. Co., 5¼% Coll. Tr., 6/1/85	1,507,500	1,563,750	.05
1,710,000	Portland Terminal Co., 6.25% 1st., 2/1/86	1,644,300	1,761,300	.06
4,101,176(b)	Railease, Inc., 4.70% Cert. of Int., 1970-79	4,101,176	4,070,417	.14
348,000	Southern Indiana Ry. Co. 2¾%-4¼% 1st Mtge., 1/1/94	282,384	249,255	.01
190,000	Southern Pacific Co., 4% Equip. Tr. Series 20, 3/1/66	191,239	189,288	.01
1,080,000	Southern Pacific Co., 4% Equip. Tr. Series 21, 5/1/66-67	1,084,790	1,071,900	.04
960,000	Southern Pacific Co., 4¼% Equip. Tr. Series 22, 9/1/66-67	960,725	954,000	.03
2,077,000	Southern Pacific Co., 4% Series 23, 11/1/65-69	2,056,950	2,074,404	.07
1,084,000	Southern Pacific Co., Oregon Lines, 4½% 1st A, 3/1/77	1,080,531	1,073,160	.04
268,000	Southern Railway Co., 4% Equip. Tr. Series ZZ, 2/15/66-67	269,147	266,325	.01
856,000	Southern Railway Co., 4% Equip. Tr. Series AAA, 3/16/66-9/16/67	853,498	849,580	.03
856,000	Southern Railway Co., 4¼% Equip. Tr. Series AAA, 3/16/66-67	861,097	854,930	.03
272,000	Texas & Pacific Ry. Co., 4⅛% Equip. Tr. Series V, 7/1/66-67	272,000	269,960	.01
900,000	Texas & Pacific Ry. Co., 4¼% Equip. Tr. Series W, 1/1/66-70	899,186	889,875	.03
2,736,000(b)	Trailer Train Co., 4½% Cert. of Int., 4/15/66-69	2,736,000	2,722,320	.09
3,141,000(b)	Trailer Train Co., 4.85% Cert. of Int., 4/15/70-79	3,141,000	3,105,664	.11
12,320,000(b)	Trailer Train Co., 4.85% Cert. of Int., 7/15/70-79	12,320,000	12,181,400	.42
6,000,000(b)	Trailer Train Co., 4.85% Cert. of Int., 10/15/65-79	6,000,000	5,940,000	.21
2,000,000(b)	Trailer Train Co., 4.85% Cert. of Int., 12/15/79	2,000,000	1,977,500	.07
1,458,884(b)	U.S. Railway Equipment Co., 6% Secured Notes, 11/1/65-2/1/72	1,458,884	1,504,475	.05
566,848(b)	U.S. Railway Equipment Co., 6¼% Equip. Ser., 11/15/65-5/15/70	566,848	584,562	.02
1,400,000	Wabash R.R. Co., 3½% 1st Mtge., 2/1/71	1,307,124	1,296,750	.05
1,300,000	Wabash R.R. Co., 4¼% Gen. Mtge. Income Series B, 1/1/91	1,082,406	1,170,000	.04
1,557,000	Western Maryland Ry. Co., 5½% Deb., 1/1/82	1,561,954	1,557,000	.05
		$ 147,691,889	$ 148,836,782	5.14%
Other Government and Revenue Bonds				
$14,400,000(b)	City of Montreal, Canada, 5% S.F. Deb., 11/1/2004	$ 14,400,000	$ 14,184,000	.49%
1,922,000	Japan External Loan, 5½% S.F., 5/1/80	1,878,806	1,845,120	.06
5,000,000	Niagara Falls Bridge Commission, 5¾% Bridge Revenue Bonds, 11/1/2000	5,000,000	5,250,000	.18
2,894,000	Nippon Telegraph & Telephone Public Corp., 5¾% Gtd. Dollar Bonds, 7/15/78	2,799,945	2,662,480	.09
		$ 24,078,751	$ 23,941,600	.82%
	Total bonds	$ 785,292,680	$ 787,206,437	27.19%
	Total short-term notes	$ 66,434,630	$ 66,434,630	2.30%
	Total investment in securities	$2,203,994,318	$2,895,090,893	100.00%

SCHEDULE I

INVESTORS MUTUAL, INC.
Investments in Securities, Continued

(continued)

BONDS (Continued)

PRINCIPAL AMOUNT	NAME OF ISSUER AND TITLE OF ISSUE	COST	MARKET VALUE (a)	PERCENTAGE OF TOTAL MARKET VALUE

Notes

(a) Securities listed on national exchanges are valued at closing market quotations at September 30, 1965. Where there were sales on that date, the values are based upon the mean between quoted bid and asked prices. Discount notes are valued at amortized cost. The value of unlisted securities is based upon the mean between bid and asked prices according to the quotations as of that date, except as otherwise indicated in note (b).

(b) At fair value in the opinion of the Directors—not currently quoted.

(c) Presently non-income producing.

(d) The cost of securities for Federal income tax purposes at September 30, 1965 was $2,204,106,825.

(e) Investment in affiliate (as defined in Section 2(a) (3) of the Investment Company Act of 1940 to include companies 5% or more of whose voting securities are held) at September 30, 1965 was:

	COST	MARKET VALUE
130,000 shares common stock of Continental Baking Co.	$6,437,254	$6,[illegible]

APPLICATION

APPLICATION for shares of stock of *Investors* MUTUAL, INC. (Company)

I (we) the undersigned apply to purchase, for the payment tendered herewith, shares of the stock of the above Company, at the public offering price determined in the manner described in the prospectus.

Shares (and fractional shares) acquired by me (us) pursuant to this application and to future payments hereunder, and through reinvested dividends, shall be credited to my (our) account upon the Company books as described below, but no certificate therefor shall be issued unless requested by me (us) or unless Company deems advisable.

Each future payment hereunder shall constitute a separate application. Each application must be expressly accepted or rejected by Company at Minneapolis, Minnesota.

ADDITIONAL PURCHASE PLAN – MAY BE INCREASED AT ANY TIME			PAYMENT TENDERED WITH APPLICATION
I (we) intend, without obligation to do so, to make additional systematic purchases of shares of Company stock in accordance with the Additional Purchase Plan indicated hereon.	AMOUNT $	☐ MONTHLY ☐ QUARTERLY ☐ AS CONVENIENT	$

	FIRST NAME	MIDDLE INITIAL	LAST NAME	AGE	
1 INDIVIDUAL USE LINE (1)					
2 TRUST USE LINES (1) AND (2)	FIRST NAME	MIDDLE INITIAL	LAST NAME	AGE	AS BENEFICIARY UNDER ATTACHED DECLARATION OF TRUST.
	AS TRUSTEE FOR				
3 JOINT TENANCY USE LINES (1) AND (3)	Registration in this form is intended to complete a gift of any contribution by either applicant in excess of his (her) pro rata share of the price and represents agreement that ownership be in such form. FIRST NAME	MIDDLE INITIAL	LAST NAME	AGE	AS JOINT TENANTS WITH RIGHT OF SURVIVORSHIP AND NOT AS TENANTS IN COMMON.
	AND				

THIS APPLICATION SIGNED AT	PERMANENT MAILING ADDRESS DESIGNATED BY APPLICANT
CITY STATE	STREET
DATE SIGNED	CITY STATE ZIP CODE
TAXPAYERS IDENTIFICATION NO. (SOCIAL SECURITY NO.)	INDICATE INDIVIDUAL'S SOCIAL SECURITY NUMBER SHOWN: ☐ NAME ON LINE 1 ☐ NAME ON LINE 3 ☐ OTHER (WRITE NAME)

X

(SIGNATURE OF APPLICANT FROM LINE 3) (SIGNATURE OF APPLICANT FROM LINE 1)

(DIVISIONAL SALES OFFICE) (OFFICE NUMBER) (SIGNATURE OF BONDED SALES REPRESENTATIVE OF INVESTORS DIVERSIFIED SERVICES, INC.)

INVESTORS DIVERSIFIED SERVICES, INC. ACTS AS BROKER FOR ISSUER IN THIS TRANSACTION

TO BE COMPLETED BY REPRESENTATIVE OR DIVISIONAL SALES OFFICE

☐ DO NOT ISSUE CERTIFICATE

☐ ISSUE CERTIFICATE - (Certificate will be mailed to applicant unless a letter signed by the applicant is attached specifying another mailing address, such as a bank, etc.)

If this is a joint application, are the tenants husband and wife? ☐ Yes ☐ No (If Yes, show husbands tax identification number only.)

DIVISIONAL SALES MANAGER NUMBER

DISTRICT SALES MANAGER NUMBER

SENIOR SALES REPRESENTATIVE NUMBER

JUNIOR SALES REPRESENTATIVE NUMBER

TO BE COMPLETED IN HOME OFFICE

CERTIFICATE MAILED	NEW	CASH	DATE ACCEPTED AND REINVESTANCE NUMBER
		FUNDS	

FORM NNOR - SERIES AA

CLASS	OCCUPATION CODE		SALE STATE	EMPL – EDIT
	INDUSTRY	OCCUPATION		

COUNTY OF RESIDENCE	SEX	BIRTH DATE					INVEST-O-MATIC CHECK
COUNTY CODE NUMBER	MALE ☐ FEMALE ☐	MONTH	DAY	YEAR	CHECK IF APPLICANT IS A FULL TIME EMPLOYEE OR A REPRESENTATIVE OF IDS FOR 90 DAYS. ☐	IS THIS APPLICATION TO BE CONSIDERED FOR A REDUCED SALES CHARGE? ☐ YES ☐ NO	☐ YES ☐ NO

OCCUPATION
IF HOUSEWIFE DEPENDENT ON HUSBAND SHOW HIS OCCUPATION.

☐ EMPLOYEE
☐ EMPLOYER

TYPE OF BUSINESS OR TRADE

OCCUPATION – DUTIES

LIST OTHER RELATED FUND, IDS, IRA & KEOGH ACCOUNTS INCLUDING OTHER APPLICATIONS IF ANY, SUBMITTED WITH THIS APPLICATION – IF NONE WRITE "NONE"

ACCOUNT NO.	NAME		RELATIONSHIP EXPLAIN IF NOT HUSBAND, WIFE OR MINOR CHILD

THE UNDERSIGNED HEREBY ACKNOWLEDGES RECEIPT OF

Investors MUTUAL, INC., PROSPECTUS AA

X _____

SIGNATURE(S) OF APPLICANT(S)

A CONFIRMATION OF YOUR PURCHASE WILL BE SENT DIRECT TO YOU BY THE HOME OFFICE

NOTE IF AUTHORIZATION BELOW IS NOT SIGNED DIVIDENDS WILL BE PAID IN CASH

AUTHORIZATION TO REINVEST DIVIDENDS

I (we) authorize the Company to pay all cash dividends hereafter owing to me (us) on shares of Company stock acquired hereunder to Investors Diversified Services, Inc. (Investors) which, as my (our) agent, forthwith shall reinvest all such dividends in additional shares of Company stock at their asset value at the close of business on the day each such dividend is reinvested.

This authorization may be terminated at any time by written notice from the Shareholder to Investors at Minneapolis, Minnesota, and such termination shall be effective upon its receipt. Investors may terminate this agency by written notice to the shareholder.

X _____ _____

(SIGNATURE OF APPLICANT FROM LINE 9) (SIGNATURE OF APPLICANT FROM LINE 11)

Growth of Investors Mutual

Fiscal Year Ended	Number of Shareholder Accounts	Number of Shares Outstanding*	Net Assets
Dec. 31, 1940	175	59,768	$ 283,885
Dec. 31, 1941	4,300	947,762	4,055,521
Dec. 31, 1942	13,500	2,894,872	12,576,650
Dec. 31, 1943	18,769	5,068,476	25,825,678
Dec. 31, 1944	27,987	8,014,336	45,915,241
Sept. 30, 1945	34,947	10,655,936	66,964,088
Sept. 30, 1946	45,136	14,004,264	86,708,471
Sept. 30, 1947	55,632	17,778,270	107,068,345
Sept. 30, 1948	65,196	21,315,530	121,188,210
Sept. 30, 1949	76,228	27,038,638	157,042,597
Sept. 30, 1950	92,087	33,780,324	218,586,332
Sept. 30, 1951	113,890	43,387,620	302,597,921
Sept. 30, 1952	145,652	56,644,570	398,529,794
Sept. 30, 1953	173,690	70,145,898	472,360,654
Sept. 30, 1954	196,444	81,347,750	662,055,980
Sept. 30, 1955	220,575	93,278,668	846,644,515
Sept. 30, 1956	249,030	104,715,277	953,717,683
Sept. 30, 1957	269,433	116,589,869	996,963,820
Sept. 30, 1958	280,787	125,301,412	1,217,926,124
Sept. 30, 1959	298,244	138,564,746	1,410,653,011
Sept. 30, 1960	316,856	150,447,890	1,504,792,065
Sept. 30, 1961	327,287	159,255,201	1,843,492,415
Sept. 30, 1962	340,386	172,739,901	1,719,389,253
Sept. 30, 1963	366,916	191,986,718	2,179,693,822
Sept. 30, 1964	398,692	214,534,724	2,620,537,529
Sept. 30, 1965	429,985	239,926,645	2,940,769,421

Since its inception in 1940, Investors Mutual has grown steadily until it is now the world's largest mutual fund. While this growth has been due in major part to the sale of shares resulting from widespread public acceptance of Investors Mutual as an investment medium, it also reflects a long-term increase in the per share asset value of the Company as shown by the table on page 3.

Not only has the number of shareholders increased each year, but also the number of those shareholders who each year add to their investment in the Company, thus demonstrating their especial confidence in and satisfaction with Investors Mutual. In fact, over 73% of the Company's shareholders, holding approximately 72% of the shares outstanding, are now consistently adding to their investment in Investors Mutual, either through the reinvestment of dividends in additional shares (see page 6) or by regular systematic purchases of additional shares (see page 6).

*Adjusted for 2-for-1 stock split on April 26, 1956.

EXECUTIVE OFFICES
Roanoke Building
Minneapolis, Minnesota

INDEPENDENT ACCOUNTANTS
Peat, Marwick, Mitchell & Co.
Minneapolis, Minnesota

CUSTODIAN
Bank of Delaware
Wilmington, Delaware

DISTRIBUTOR AND INVESTMENT MANAGER
Investors Diversified Services, Inc.
Investors Building, Minneapolis, Minnesota

[Exhibit 4 to Affidavit of James F. Fitzpatrick Civ. Act. No. 1083-66 United States District Court for the District of Columbia]

[Letterhead of Comptroller of the Currency]

STATEMENT OF THE COMPTROLLER OF THE CURRENCY

This Office fully supports and approves of the plans of the First National City Bank of New York to establish a commingled fund for agency accounts. Since April of 1963, when Regulation 9 was revised to open the door to such activities by banks, we have sought to have removed the artificial restraints which have heretofore needlessly kept them from offering these constructive services. It is believed that a significant benefit will be derived for the public and the economy—one which banks have been uniquely qualified to perform since they entered the fiduciary field. As we have pointed out many times previously, the collective investment of agency accounts involves no more than an economic combination of services which have heretofore been performed separately by bank trust departments.

We have been aware from its inception of the intent of First National City Bank to explore the possibility of working out a way of operating a commingled fund which satisfied the staff of the SEC that their laws were being complied with, and which did not involve prohibitive burdens upon the bank. We have approved and encouraged this course of action as we have similarly encouraged other substantial and qualified efforts to provide these services. The proposed arrangement was given the specific approval of this Office early this year, and if it is put into operation, Regulation 9 will be amended to include a general provision authorizing such funds so that specific approval will not be necessary. It is our hope that this development will lead to the resolution of the difficulties which have existed previously and that no obstacles will be raised now or in the

future which would serve unduly to hamper or preclude bank operation of commingled funds for agency accounts.

August 25, 1965

[Exhibit 6 to Affidavit of James F. Fitzpatrick Civ. Act. No. 1083-66 United States District Court for the District of Columbia]

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C.

FORM N-8B-1

REGISTRATION STATEMENT OF MANAGEMENT INVESTMENT COMPANY

Pursuant to Section 8 of

THE INVESTMENT COMPANY ACT OF 1940

COMMINGLED INVESTMENT ACCOUNT OF FIRST NATIONAL CITY BANK
(Name of Registrant)

399 Park Avenue, New York, New York
(Address of principal executive office)

Item 1. *General Information.*

Registrant is a collective investment fund established in the State of New York by resolution of the Board of Directors of First National City Bank on September 21, 1965 pursuant to applicable regulations of the Comptroller of the Currency.

Item 2. *Development of Business.*

Not applicable.

Item 3. *Subclassification of Registrant.*

(a) Registrant is an open-end investment company.

(b) Registrant proposes to operate as a diversified investment company.

Item 4. *Fundamental Policies of the Registrant.*

Registrant's fundamental policies (including, but not limited to, those with respect to the borrowing of money, the underwriting of securities of other issuers, the concentration of investments in particular industries, the purchase and sale of real estate, the purchase and sale of commodities or commodity contracts, the making of loans to other persons, the type of securities in which it may invest, the percentage of assets which it may invest in the securities of any one issuer, the percentage of voting securities of any one issuer which it may acquire, investment in companies for the purpose of exercising control or management, investment in securities of other investment companies and portfolio turnover) are stated under the headings "Investment Policy" and "Investment Restrictions" in the Preliminary Prospectus comprising part of Registrant's Registration Statement on Form S-5 under the Securities Act of 1933, filed the same date as this Registration Statement. A copy of such Prospectus is filed herewith, and all statements of policy appearing under the headings "Investment Policy" and "Investment Restrictions" are hereby incorporated by reference in this Registration Statement and are hereby stated to be fundamental policies of Registrant.

Item 5. *Policies with Respect to Security Investments.*

All of Registrant's policies with respect to security investments are treated as fundamental policies under Item 4 above.

Item 6. *Diversification of Assets.*

Not applicable. Registrant held no securities or any other assets on the date of registration, and its first fiscal year has not ended.

Item 7. *Underwriting Commitments.*

Not applicable. Registrant has made no commitments as underwriter, and it is a fundamental policy of Registrant that its funds will not be used in the underwriting of securities. See Item 4 of this Registration Statement.

Item 8. *Tax Status.*

Registrant has not had, to date, a taxable year. Registrant has obtained a ruling of the Internal Revenue Service that it will be classified as an association taxable as a corporation for Federal income tax purposes and Registrant intends to meet the requirements of subchapter M of chapter 1 of subtitle A of the Internal Revenue Code of 1954 during the current taxable year.

Item 9. *Pending Legal Proceedings.*

None.

Item 10. *Capitalization.**

*As of date of filing–first fiscal year has not ended.

(1)	(2)	(3)	(4)
Title of class	Amount authorized	Amount held by registrant or for its account	Amount outstanding exclusive of amount shown under (3)
Units of participation	Unlimited	None	None

Item 11. *Defaults and Arrears on Senior Securities.*

(a) Not applicable.

(b) Not applicable.

Item 12. *Condensed Financial Information.*

(a) Not applicable. Registrant has no assets now and has had no assets, income or operating expenses during the last ten years.

(b) Not applicable. Registrant has no senior securities outstanding now and has had no senior securities outstanding during the last ten years.

Item 13. *Persons in Control Relationship with Registrant.*

Registrant does not control any company. Registrant has no units of participation presently outstanding, and at the date of the filing of this Registration Statement, might be deemed to be controlled by its organizer and proposed investment adviser, First National City Bank, New York, New York, a national banking association, and under common control with the following other companies (exclusive of inactive companies, nominee companies and companies for the ownership or operation of real estate) which are presumed to be directly or indirectly controlled by First National City Bank within the meaning of the Investment Company Act of 1940:

Name of Company	State of Incorporation or Sovereign Power under the Laws of which Organized	Percentage of Voting Power Owned by First National City Bank	Percentage of Voting Power Owned by a directly or indirectly owned subsidiary of First National City Bank
First National City Overseas Investment Corporation	United States - Edge Act Corporation	100%	
First Consolidated Leasing Company	Republic of South Africa		35%
Currie Leasing Corporation Ltd.	Republic of South Africa		50%
International Banking Corporation	Connecticut	100%	
The Bank of Monrovia	Liberia		100%
The First National City Bank of New York (South Africa) Ltd.	Republic of South Africa		100%*
First National City Trust Company (Bahamas) Ltd.	Bahamas		100%*
The Mercantile Bank of Canada	Canada		100%*
International Trust Company	Quebec		100%*
H.C. Andreae & Company Limited	Canada		100%*
Andreae Equity Investment Fund Limited	Canada		20%**
New York London Trustee Co. Limited	England		75%***
Banque Internationale pour L'Afrique Occidentale	France		40%
Banco de Honduras S.A.	Honduras		51%
FNCB Services Corporation	New York	100%	
Carte Blanche Corporation	Delaware		100%

* Exclusive of directors' or shareholders' qualifying shares.

** International Trust Company has an option to acquire an additional 30% of the voting securities of Andreae Equity Investment Fund Limited.

*** The remaining 25% of the voting securities of New York London Trustee Co. Limited are owned by Hill, Samuel & Co. Limited, an English Company in which International Banking Corporation owns approximately a 10% interest.

As soon as units of participation are outstanding, First National City Bank will, pursuant to the provisions of the Investment Company Act of 1940, be presumed not to control Registrant, although such presumption may be rebutted. First National City Bank may be deemed to control Registrant for the purposes of the provisions of the Securities Act of 1933 relating to the liability of controlling persons notwithstanding any presumption to the contrary under the provisions of the Investment Company Act of 1940. Reference is made to the statements under the headings "Purpose", "Supervision and Management", "Investment Policy", "Units of Participation", "Admission to the Commingled Account", "Termination of Participations", "Management Services", "Members of the Committee", "Meetings of Participants", "Election of Members of the Committee", "Termination of the Commingled Account", and "Status of the Commingled Account" and to the form of Authorization for Commingling of Agency Accounts in the Preliminary Prospectus comprising part of Registrant's Registration Statement on Form S-5 under the Securities Act of 1933, filed the same date as this Registration Statement, for a statement of the material facts pertinent to the possible existence of control of Registrant by First National City Bank. A copy of such Prospectus is filed herewith, and all statements under the headings referred to above and all terms of the Authorization for Commingling of Agency Accounts which are pertinent to the possible existence of control are hereby incorporated by reference in this Registration Statement.

Item 14. *Persons Owning Equity Securities of Registrant.*

None (as of date of filing).

Item 15. *Number of Holders of Equity Securities.*

None (as of date of filing).

Item 16. *Directors and Executive Officers.*

All of the following persons are members of the Committee for Registrant. Registrant has no executive officers.

Name and Address	Principal Occupations During Past Five Years
Robert L. Hoguet, Jr.* 399 Park Avenue New York, New York	Executive Vice President, First National City Bank, Trust and Investment Division**
Conrad F. Ahrens 399 Park Avenue New York, New York	Vice President, First National City Bank, Trust and Investment Division, Investment Research Department**
John D. Lockton 570 Lexington Avenue New York, New York	Treasurer, General Electric Company; Chairman, Trustees of the General Electric Pension Trust and other General Electric trusts; Trustee, Elfund Trusts
Paul Saurel 60 Wall Street New York, New York	Partner, Messrs. Morris & McVeigh, Attorneys
Hulbert W. Tripp 399 Park Avenue New York, New York	Senior Vice President, First National City Bank, Trust and Investment Division (since January 1965); Chairman, Investments Committee, University of Rochester (since January 1965); prior to January 1965, Financial Vice President, University of Rochester

*Chairman of the Committee.

**Messrs. Hoguet and Ahrens have been associated with First National City Bank in responsible positions for more than the past five years, although not at all times in the positions shown.

Item 17. *Members of Advisory Board of Registrant.*

Not applicable.

Item 18. *Remuneration of Directors, Officers and Members of Advisory Board.*

(a) Members of the Committee for Registrant who are affiliated with First National City Bank receive no remuneration from Registrant. The Committee determines the remuneration paid to the members of the Committee who are not affiliated with First National City Bank, and Registrant is reimbursed by First National City Bank. There are at present and are expected to be during Registrant's first fiscal year two such members. Although no remuneration has been paid to such members as of the date of filing, it is expected that such members will in the aggregate receive fees of $5,000 during Registrant's first fiscal year ending August 31, 1966, and fees of $10,000 for the succeeding full fiscal year.

(b) Not applicable. Registrant has no plan for the payment of pension or retirement benefits.

Item 19. *Indemnification of Directors and Officers.*

There are no contracts, arrangements or statutes under which any member of the Committee for Registrant is insured or indemnified by Registrant against any liability which any such member may incur in his capacity as such.

Article NINTH of the Articles of Association of First National City Bank, Registrant's proposed investment adviser, provides that any person, his heirs, executors or administrators, may be indemnified or reimbursed by First National City Bank for reasonable expenses actually incurred in connection with any action,

suit or proceeding, civil or criminal, to which he or they shall be made a party by reason of his being or having been a director, officer or employee of First National City Bank or of any firm, corporation or organization which he served in any such capacity at the request of First National City Bank.

It is specifically provided, however, that no person shall be so indemnified or reimbursed in relation to any matter in such action, suit or proceeding as to which he shall finally be adjudged to have been guilty of or liable for negligence or wilful misconduct in the performance of his duties to First National City Bank. It is further provided that no person shall be so indemnified or reimbursed in relation to any matter in such action, suit or proceeding which has been made the subject of a compromise settlement except with the approval of a court of competent jurisdiction, or the holders of record of a majority of the outstanding shares of First National City Bank, or the Board of Directors of said Bank, acting by vote of directors not parties to the same or substantially the same action, suit or proceeding, constituting a majority of the whole number of the directors.

Article NINTH of the Articles of Association of First National City Bank states that the right of indemnification or reimbursement provided therein shall not be exclusive of other rights to which such person, his heirs, executors or administrators, may be entitled as a matter of law.

To the extent that indemnification by First National City Bank for liability arising under the Securities Act of 1933 or the Investment

Company Act of 1940 is permitted to members of the Committee for Registrant pursuant to the foregoing or otherwise (including, without limitation, pursuant to any applicable statute or rule of law of the State of New York), Registrant is advised that the Securities and Exchange Commission is of the opinion that such indemnification is against public policy, as expressed in the Securities Act of 1933 and in the Investment Company Act of 1940, and therefore is unenforceable. In the event that a claim for such indemnification (except to the extent that such claim seeks reimbursement by First National City Bank of expenses paid or incurred in connection with the successful defense of any action, suit or proceeding) arises and the Securities and Exchange Commission is still of the same opinion, First National City Bank, in the absence of precedent deemed controlling by First National City Bank, will submit to a court of appropriate jurisdiction the question whether indemnification by First National City Bank is against public policy as expressed in the Securities Act of 1933 and in the Investment Company Act of 1940 and therefore unenforceable, and will be governed by final adjudication of such issue.

Item 20. *Employees of Registrant.*

Not applicable. Registrant has no employees as of the date of filing and does not intend to have any employees, and there is no company, with relation to Registrant, of the character specified in Section 2(a)(19)(iii) of the Act.

Item 21. *Custodians of Portfolio Securities.*

(a) The custodian of Registrant's portfolio securities will be First National City Bank, 399 Park Avenue, New York, New York.

(b) The arrangements under which such securities will be held are set forth in the Management Agreement, which will be executed in substantially the form attached as Exhibit D to Registrant's Registration Statement on Form S-5 under the Securities Act of 1933, filed the same date as this Registration Statement, and incorporated by reference as Exhibit 5 to this Registration Statement. The following statements relating to certain provisions of the Agreement are merely brief summaries thereof. Reference is hereby made to Exhibit 5 hereto for a full and complete statement of all the provisions thereof, to which all the following statements are subject, and such statements are qualified in their entirety by such reference. Whenever particular provisions of the Agreement are hereinafter referred to, the statements preceding such reference are qualified in their entirety thereby.

Under the Agreement, First National City Bank will at all times have custody of Registrant's assets. (Paragraph 3) Except in specified instances, securities sold for Registrant will be delivered only against payment. (Paragraph 4) First National City Bank will act as paying or disbursing agent for all funds distributed to participants. (Paragraph 6)

For all of its services under the Agreement, including its investment management and custodian services, First National City Bank will receive as of the last day of each fiscal quarter a fee of 1/8 of 1% of the average of the values of Registrant's net assets taken on each valuation date during such quarter. (Paragraph 10)

The Agreement will remain in force for a maximum of two years from its date of execu-

tion and will continue from year to year thereafter, but only so long as such continuance is approved at least annually either by the Committee for Registrant (including approval by a majority of the members of the Committee who are not affiliated with First National City Bank) or by the vote of participants having a majority of Registrant's units of participation. The Agreement will be terminable on 60 days' written notice by the Committee for Registrant, by the vote of participants having a majority of Registrant's units of participation or by First National City Bank, and will terminate automatically in the event of its assignment by First National City Bank or if it shall not be approved by the vote of participants having a majority of Registrant's units of participation at the first meeting of participants. (Paragraph 12)

Item 22. *Investment Advisers.*

(a) First National City Bank, 399 Park Avenue, New York, New York, will be the investment adviser of Registrant.

(b) The following members of the Committee for Registrant (whose addresses are all 399 Park Avenue, New York, New York) are also affiliated with the proposed investment adviser of Registrant by virtue of their being officers of First National City Bank: Robert L. Hoguet, Jr., Hulbert W. Tripp and Conrad F. Ahrens.

If Registrant is controlled by its proposed investment adviser, First National City Bank, the subsidiaries of First National City Bank listed in Item 13 of this Registration Statement would also be affiliated persons of Registrant by reason of common control by First National City Bank.

(c) First National City Bank will be the investment adviser of Registrant pursuant to the Management Agreement referred to in paragraph (b) of Item 21 of this Registration Statement. The following statements relating to certain provisions of the Agreement are merely brief summaries thereof. Reference is hereby made to Exhibit 5 hereto for a full and complete statement of all of the provisions thereof, to which all the following statements are subject, and such statements are qualified in their entirety by such reference. Whenever particular provisions of the Agreement are hereinafter referred to, the statements preceding such reference are qualified in their entirety thereby.

Under the Agreement, First National City Bank will maintain a continuous investment program for Registrant, not inconsistent with Registrant's stated investment policy. First National City Bank will determine what securities are to be purchased or sold for Registrant and will execute transactions for Registrant accordingly. First National City Bank will determine what portion, if any, of Registrant's assets should be held uninvested and what portion, if any, should be invested in Government obligations. (Paragraph 1)

First National City Bank will reimburse Registrant for any compensation paid by Registrant to any member of the Committee for Registrant who is not affiliated with First National City Bank and will furnish administrative and clerical services, office space and facilities required for the operation of Registrant. First National City Bank will also pay all costs and expenses arising in connection with Regis-

trant's organization, including its initial registration and qualification under the Federal securities laws and under other applicable regulatory requirements, but the cost of maintaining such registration and qualification (other than the cost of printing, publication and distribution of current reports to Participants, which will be paid by First National City Bank) will be an expense of Registrant. The Agreement specifies certain other costs, including the cost of independent professional services (other than in connection with Registrant's organization) and the cost of preparation and distribution of notices to participants and proxy statements, which will be expenses of Registrant. (Paragraph 2)

The provisions of the Agreement respecting the remuneration of First National City Bank for its services (including its services as custodian) under the Agreement and the provisions of the Agreement respecting its duration and termination are described in the third and fourth subparagraphs, respectively, of paragraph (b) of Item 21 of this Registration Statement and reference is hereby made to such subparagraphs for a brief summary of such provisions.

Item 23. *Business and Other Connections of Investment Advisers and Their Managements.*

First National City Bank, proposed investment adviser of Registrant, is a national banking association which has been granted the right to exercise fiduciary powers. As such, it performs a wide variety of the functions of a commercial bank and trust company.

The business and other connections of a substantial nature of each director and senior

officer of First National City Bank having such connections are listed below:*

Directors and senior officers of First National City Bank, proposed investment adviser to Registrant, having other connections	Nature and principal business of other company with which connected	Nature of connection with other company
DIRECTORS		
William M. Batten	J.C. Penney Company, Inc. (operates retail stores)	Chairman and Director
	American Telephone and Telegraph Company	Director
John E. Bierwirth	Deering Milliken Inc. (manufactures textiles)	Director
	Discount Corporation (discount trade bankers)	Director
	Dominick Fund, Inc. (closed-end investment company)	Director
	Hugoton Production Company (produces natural gas)	Director
	Mercantile Stores, Inc. (operates retail stores)	Director
	National Distillers and Chemical Corporation and subsidiaries (produces whiskies and chemicals)	Chairman of the Board and Director
	A-B Chemical Corporation (manufactures polyethylene)	Director and President
	National Helium Corporation (manufactures helium)	Director
	National Petro-Chemical Corporation (manufactures plastics)	Director and President

*Nineteen other senior officers of First National City Bank do not have outside business or other connections of a substantial nature. The term "senior officer" includes each officer with the title of senior vice president or higher.

	Reactive Metals Inc. (produces titanium and zirconium)	Director
	Owens-Corning Fiberglas Corporation (manufactures fibrous glass products)	Director
	Panhandle Eastern Pipe Line Company and subsidiary companies (public utility pipelines)	Director
	Textron, Inc. (diversified manufacturer)	Director
Charles M. Brinckerhoff	A. C. F. Industries (diversified manufacturer)	Director
	The Anaconda Company and subsidiaries (mines, smelts and fabricates non-ferrous metals)	Chairman of the Board and Director
	First Bank Stock Corporation (bank holding company)	Director
C. Sterling Bunnell, Chairman Credit Policy Committee	BASF Colors and Chemicals, Inc. and affiliate (manufactures dyes and chemicals)	Director
	Hi-Alloys Inc. (manufactures tool steels)	Director
	Inspiration Consolidated Copper Co. (produces electrolytic copper)	Director
	Munich Management Corp. (U.S. branch of Munich Reinsurance Co.)	Director
	Siemens Overseas Investments Ltd. (investment holding company)	Director
Percy Chubb, 2nd	Chubb and Son Inc. and affiliates (insurance brokers and underwriters)	Chairman and Director
	New Jersey Bell Telephone Company	Director

R. Gwin Follis	Standard Oil Company of California and subsidiaries	Chairman of the Board and Director
	American Gilsonite Company (mines gilsonite)	Deputy Chairman of the Board and Director
	Crocker-Citizens National Bank of San Francisco	Director
J. Peter Grace	Atlantic Mutual Insurance Co. and subsidiary companies	Trustee
	Brazilian Traction, Light & Power Company, Ltd. (public utility)	Director
	Magnavox Company (manufactures electronic equipment)	Director
	Deering Milliken, Inc. (manufactures textiles)	Director
	Emigrant Industrial Savings Bank	Trustee
	W. R. Grace & Co. and subsidiaries (manufactures chemicals and operates steamship line)	President and Director
	Ingersoll-Rand Company (manufactures machinery)	Director
	Kennecott Copper Corporation and subsidiaries (produces copper products)	Director
	Marine Midland Corporation (bank holding company)	Director
	Miller Brewing Company (brews malt beverages)	Director
	Northern Insurance Company of New York and subsidiaries	Director

	Stone & Webster, Incorporated (engineering and security underwriting)	Director
Joseph A. Grazier	American Radiator & Standard Sanitary Corporation (manufactures heating and plumbing equipment)	Chairman of the Board, President and Director
	Bristol-Myers Company (manufactures drugs and toilet articles)	Director
	Johns-Manville Corporation (manufactures insulating materials)	Director
	The National Cash Register Co.	Director
Michael L. Haider	Standard Oil Co. (New Jersey)	Chairman of the Board, Chief Executive Officer and Director
H. Mansfield Horner	Hartford National Bank & Trust Co.	Director
	Southern New England Telephone Co.	Director
	The Travelers Insurance Company	Director
	United Aircraft Corporation and subsidiary (manufactures aircraft and engines)	Chairman and Director
Amory Houghton	Corning Glass Works	Honorary Chairman of the Board and Director
	Pittsburgh-Corning Corp. (manufactures cellular glass products)	Director
	Dow-Corning Corp. (manufactures silicones)	Director
	Metropolitan Life Insurance Company	Director
	Lincoln Rochester Trust Company	Member Advisory Board

George P. Jenkins	Metropolitan Life Insurance Company	Chairman of Finance Committee and Director
	East River Savings Bank	Director
	American Broadcasting Companies, Inc. (television and radio networks and movie theatre chain)	Director
	St. Regis Paper Company (lumber and paper products)	Director
John R. Kimberly	Kimberly-Clark Corporation (manufactures cellulose papers)	President and Director
	Wisconsin Telephone Company	Director
	First National Bank, Neenah, Wis.	Director
	Corning Glass Works	Director
	Northwestern Mutual Life Insurance Co.	Trustee
Roger Milliken	Deering Milliken, Inc. and subsidiaries (manufactures textiles)	President
	W. R. Grace & Co. and subsidiaries (manufactures chemicals and operates steamship line)	Director
	Mercantile Stores Company, Inc. (operates retail stores)	Director
	Westinghouse Electric Corp.	Director
George S. Moore President	Borg Warner Corporation (manufactures auto parts and household appliances)	Director
	Federal Insurance Company	Director
	Mercantile Stores Company, Inc. (operates retail stores)	Director

	Sanborn Hnos (operates retail stores)	Alternate Director
	Union Pacific Railroad Company and subsidiaries	Director
	United Aircraft Corporation (manufactures aircraft and engines)	Director
	United States Steel Corporation	Director
	Vigilant Insurance Company	Director
Charles G. Mortimer	General Foods Corporation and subsidiaries (produces food products)	Director and Chairman of Executive Committee
	Federal Street Fund (tax-free exchange investment company)	Director
	Ford Motor Company	Director
	Socony Mobil Oil Company, Inc.	Director
	Bell & Howell Company (manufactures photographic equipment)	Director
	Meredith Publishing Company (publisher and operator of television and radio stations	Director and Chairman of Executive Committee
Robert S. Oelman	Koppers Company, Inc. (produces crude oil products)	Director
	The National Cash Register Company	Chairman and Director
	The Ohio Bell Telephone Company	Director
	The Procter & Gamble Co. (produces soaps and foodstuffs)	Director
	The Winters National Bank & Trust Company	Director

Charles C. Parlin	Shearman & Sterling (attorneys)	Member
	Celanese Corporation of America (manufactures synthetic fibers)	Director
	Compania Ontario, S.A. (import-export banking)	Director
	Guerlain, Inc. (imports perfumes)	Director
	Potash Import & Chemical Corporation (importing and trading)	Director
	Schlumberger Limited (holds oil wells and electronic equipment companies)	Director
	United States & Foreign Securities Corporation (closed-end investment company)	President and Director
Richard S. Perkins Chairman of the Executive Committee	Allied Chemical Corporation (produces chemicals and alkalies)	Director and Member of Executive Committee
	Consolidated Edison Co. of N.Y. (public utility)	Trustee and Member of Finance Committee
	Hill, Samuel & Co. Limited (English merchant banking firm)	Director
	New York Life Insurance Company	Director and Member of Finance Committee
	Royal-Globe Insurance Companies	Member of Investment Committee
	International Telephone & Telegraph Corporation	Director and Member of Executive Committee

	Phelps Dodge Corporation (produces copper)	Director
	Southern Pacific Company (holds railway system)	Director
Clifton W. Phalen	New York Telephone Company	Chairman, Director and Member of Executive Committee
	Federal Insurance Company and subsidiary	Director
	Kennecott Copper Corporation and subsidiary (produces copper)	Director and Member of Executive Committee
James S. Rockefeller Chairman	Cranston Print Works Company (finishers of cotton goods)	Director
	The National Cash Register Company	Director
	Pan American World Airways, Inc.	Director
	The Anaconda Company (mines, smelts and fabricates non-ferrous metals)	Director
	Kimberly-Clark Corporation (manufactures cellulose papers)	Director
	Northern Pacific Railway Company	Director
Charles H. Sommer	Monsanto Company and affiliates (produces chemicals and oils)	President, Chairman of Executive Committee and Director
	Trans World Airlines, Inc. (operates airway system)	Director
	Liberty Mutual Insurance Company and subsidiary	Director

	St. Louis Union Trust Company	Director
William C. Stolk	American Can Company and subsidiaries (manufactures containers)	Director
	Johns-Manville Corp. (manufactures insulating materials)	Director
Leo D. Welch	Communications Satellite Corporation	Director
	Electric Bond & Share Company (engineering and chemical producer)	Director
Joseph C. Wilson	Xerox Corporation (manufactures office copying equipment)	President and Director
	The Rank Organization Limited (English film producer)	Director
	Rank Xerox Limited (English manufacturer of office copying equipment)	Director
	Fuji-Xerox Corporation Limited (Japanese manufacturer of office copying equipment)	Director
	Massachusetts Mutual Life Insurance Company	Director
	Lincoln-Rochester Trust Company	Director
	McCurdy & Company (department store)	Director
	Rochester Gas and Electric Corp. (public utility)	Director
	Small Business Investment Company of New York, Inc.	Director
	Rochester Savings Bank	Trustee

SENIOR OFFICERS

(Messrs. Rockefeller, Moore, Perkins and Bunnell included above as Directors)

J. Howard Laeri Vice Chairman	Great Northern Railway Company	Director
	St. Regis Paper Company (manufactures lumber and paper products)	Director
	Sinclair Oil Corporation	Director
Robert L. Hoguet, Jr. Executive Vice President	Andreae Equity Investment Fund Ltd. (Canadian investment company)	Director
	Phoenix Assurance Co.	Director
Edward L. Palmer Executive Vice President	Potlatch Forests, Inc. (produces lumber and derivatives)	Director
	Jamaica Water Supply Co.	Director
William I. Spencer Executive Vice President	Electrochemical Processes, Inc. (process licensor)	Director
	The Prudential Insurance Company of Great Britain	Director
Thomas R. Wilcox Executive Vice President	The Boeing Company (manufactures airplanes)	Director
	Colgate-Palmolive Company (manufactures soaps, cosmetics)	Director
	Mutual Life Insurance Company of New York	Trustee
	National Distillers and Chemicals Corporation (produces whiskies and chemicals)	Director
Walter B. Wriston Executive Vice President	General Mills, Inc. (produces flour and related food products)	Member of Finance Committee and Director
	General Electric Company	Director and Member of Finance Committee

	J.C. Penney Co. (operates retail stores)	Director
G. A. Costanzo Senior Vice President	Owens-Illinois Corp. (manufactures glass products)	Director
E. Newton Cutler, Jr. Senior Vice President	American Radiator & Standard Sanitary Corp. (manufactures heating and plumbing equipment)	Director
	Trust Company of Morris County	Director
	Consumers Power Company (public utility)	Director
John Exter Senior Vice President	African-South African Investment Co., Limited (mines gold and diamonds)	Director
Stephen C. Eyre Senior Vice President	Bayer Foreign Investments Limited (produces chemicals and fertilizers)	Director
John F. Fitzgerald Senior Vice President	Arwood Corporation (manufactures cast metal products)	Director
	Keweenaw Land Association, Ltd. and subsidiaries (holds real estate)	Manager
	J. R. Wood & Sons, Inc. (manufactures diamond rings)	Director
Henry M. Hubshman, Jr. Senior Vice President	Canteen Corporation (operates automatic vending machines)	Director
	Transcaribbean Airways, Inc. and subsidiaries (operates transportation systems)	Director
P. Henry Mueller Senior Vice President	Wyomissing Corporation (manufactures textiles and paper products)	Director
Eben W. Pyne Senior Vice President	Long Island Lighting Company (public utility)	Director

	W. R. Grace & Co. (manufactures chemicals and operates steamship line)	Director
	Phoenix Assurance Company of N.Y.	Director
	The United States Life Insurance Company in the City of New York	Director
	City Investing Company (holds real estate)	Director
	The Long Island Railroad Company	Director
Hulbert W. Tripp Senior Vice President	Xerox Corporation (manufactures office copying equipment)	Director
	Ritter Pfaulder Corp. (manufactures corrosion resistant equipment)	Director
	Rochester Gas & Electric Corp. (public utility)	Director
	University of Rochester	Chairman of Investment Committee

Item 24. *Personnel of Investment Advisers.*

The number of officers (other than senior officers) and other personnel of First National City Bank, Registrant's proposed investment adviser, assigned to the Bank's Investment Advisory, Investment Research and Economics Departments (which Departments will be most directly concerned with the management of Registrant's portfolio), are, as of April 15, 1966, as follows:

Class of Personnel	Number of Full-Time Employees	Number of Part-Time Employees
Account supervisors, counsellors and executives	28	None
Economists, statisticians and research personnel	68	None
All other personnel	60	None

In addition, officers and employees of First National City Bank assigned to other departments will render supporting services to Registrant pursuant to the Management Agreement referred to in paragraph (b) of Item 21 of this Registration Statement.

Item 25. *Remuneration of Certain Affiliated Persons.*

Not applicable. Registrant has not as of the date of filing paid any remuneration to any person.

Item 26. *Capital Stock.*

None. See answer to Item 28 of this Registration Statement.

Item 27. *Long-Term Debt.*

None.

Item 28. Other Securities.

Interests in Registrant are represented by units of participation of equal value. All of the units of participation have equal rights to participate in distributions of net investment income and capital gains and to participate in Registrant's assets on liquidation. Fractions of units, carried out to three decimal places, are used. Each participant is entitled to such number of votes for the election of members of the Committee for Registrant and on all other matters voted on as is equal to the number of units of participation (including fractions of units) held by such participant. There are no pre-emptive rights, conversion rights or sinking fund provisions, and units of participation are not liable to further calls or to assessment by Registrant.

The provisions governing the redemption of units of participation are contained in full under the headings "Determination of Net Asset Value" and "Termination of Participations" in the Preliminary Prospectus comprising part of Registrant's Registration Statement on Form S-5 under the Securities Act of 1933, filed the same date as this Registration Statement. A copy of such Prospectus is filed herewith, and all statements with respect to termination of units of participation and the determination of net asset value of units of participation appearing under such headings are hereby incorporated by reference in this Registration Statement. Units of participation may be transferred only to persons who have validly appointed First National City Bank as managing agent (see the forms of Authorization for Commingling of Agency Accounts incorporated by reference as Exhibits 3(a) and 3(b) to this

Registration Statement) and, in the case of transfers of less than all of the units owned by a participant, only if after the transfer the transferor and the transferee will each own units having an aggregate net asset value of not less than $10,000.

Item 29. *General Information as to Distribution of Securities.*

(a) Registrant is not currently offering its units of participation. Registrant expects to raise its minimum capital of $100,000 through an initial private offering of units of participation at $10 per unit to a small group of persons intending to acquire such units for investment.

(b) It is expected that initially Registrant's units of participation will be lawfully offered by Registrant through the offices of First National City Bank in New York.

Item 30. *Pricing of Securities for Sale, Redemption or Repurchase.*

(a) The method to be followed by Registrant in determining the price at which units of participation will be offered to the public and redeemed is described under the headings "Determination of Net Asset Value", "Admission to the Commingled Account" and "Termination of Participations" in the Preliminary Prospectus comprising part of Registrant's Registration Statement on Form S-5 under the Securities Act of 1933, filed the same date as this Registration Statement. A copy of such Prospectus is filed herewith and all statements appearing under such headings are hereby incorporated by reference in this Registration Statement.

The method of calculation of the net asset value per unit of participation is illustrated by the following hypothetical price make-up sheet:

HYPOTHETICAL PRICE MAKE-UP SHEET

Investment at market		$3,000,000.00
Cash and accounts receivable		2,000.00
Income receivable		300.00
	Total	$3,002,300.00
Accounts payable	$ 100.00	
Accrued taxes and expenses	1,100.00	1,200.00
Value of net assets		$3,001,100.00
Number of units of participation outstanding		300,000
Net asset value per unit		$10.00366
Net asset value per unit adjusted for fractions		$10.00

(b) There will be no sales load.

(c) As stated under the heading "Distributions and Federal Tax Status" in Registrant's Preliminary Prospectus, distributions of net long-term capital gains realized from the sale of Registrant's securities will be paid in units of participation taken at their net asset value unless the participant elects to receive payment entirely in cash.

Item 31. *Principal Underwriters.*

(a) The Securities and Exchange Commission regards First National City Bank, 399 Park Avenue, New York, New York, as Registrant's statutory principal underwriter. See Items 1, 13, 16, 19, 21 and 22 of this Registration Statement as to the nature of any material relationship of First National City Bank with Registrant (other than that of principal underwriter).

(b) First National City Bank acts as investment adviser to National Variable Annuity Company of Florida relative to the assets of the National Variable Annuity Company of Florida Special Account, which is registered as an investment company under the Investment Company Act of 1940.

First National City Bank also acts as investment adviser to the Equity Annuity Life Insurance Company, which is registered as an investment company under the Investment Company Act of 1940.

First National City Bank also acts as investment adviser to the Netherlands Antilles Mutual Fund, N.V., an investment company organized under the laws of the Netherlands Antilles, the shares of which are available only to persons who are neither residents of nor citizens of the United States.

International Trust Company, a wholly-owned Canadian subsidiary of International Banking Corporation, which is in turn wholly owned by First National City Bank, furnishes investment advice with respect to American securities to International Fund Distributors Limited in its capacity as investment adviser to Andreae Equity Investment Fund Limited, a Canadian investment company.

Item 32. *Management of Principal Underwriters.*

Information with respect to each director and senior officer (i.e., each officer with the title of senior vice president or higher) of First National City Bank is furnished in the following table:

Name and principal business address	Positions and offices with underwriter	Positions and offices with Registrant
DIRECTORS		
William M. Batten 1301 Avenue of the Americas New York, New York 10019	Director	None
John E. Bierwirth 99 Park Avenue New York, New York 10016	Director	None
Charles M. Brinckerhoff 25 Broadway New York, New York 10004	Director	None
C. Sterling Bunnell 399 Park Avenue New York, New York 10022	Chairman Credit Policy Committee and Director	None
Percy Chubb, 2nd 90 John Street New York, New York 10038	Director	None
R. Gwin Follis 225 Bush Street San Francisco, California 94120	Director	None
J. Peter Grace 7 Hanover Square New York, New York 10005	Director	None
Joseph A. Grazier 40 West 40th Street New York, New York 10018	Director	None
Michael L. Haider 30 Rockefeller Plaza New York, New York 10020	Director	None
H. Mansfield Horner 400 Main Street East Hartford, Connecticut 06108	Director	None
Amory Houghton 717 Fifth Avenue New York, New York 10022	Director	None

George P. Jenkins One Madison Avenue New York, New York 10010	Director	None
John R. Kimberly North Lake Street Neenah, Wisconsin 54957	Director	None
Roger Milliken 234 South Fairview Avenue Spartanburg, South Carolina 29302	Director	None
George S. Moore 399 Park Avenue New York, New York 10022	President and Director	None
Charles G. Mortimer 250 North Street White Plains, New York 10602	Director	None
Robert S. Oelman South Main and K Streets Dayton, Ohio 45409	Director	None
Charles C. Parlin 20 Exchange Place New York, New York 10005	Director	None
Richard S. Perkins 399 Park Avenue New York, New York 10022	Chairman of the Executive Committee and Director	None
Clifton W. Phalen 140 West Street New York, New York 10007	Director	None
James S. Rockefeller 399 Park Avenue New York, New York 10022	Chairman and Director	None
Charles H. Sommer 800 N. Lindbergh Boulevard St. Louis, Missouri 63166	Director	None
William C. Stolk 14 Sutton Place South New York, New York 10022	Director	None

Leo D. Welch Room 1250 One Rockefeller Plaza New York, New York 10020	Director	None
Joseph C. Wilson 1250 Midtown Tower Rochester, New York 14604	Director	None

SENIOR OFFICERS

(Messrs. Rockefeller, Moore, Perkins and Bunnell included above as Directors)

J. Howard Laeri 399 Park Avenue New York, New York 10022	Vice Chairman	None
A. Halsey Cook 399 Park Avenue New York, New York 10022	Executive Vice President	None
Robert L. Hoguet, Jr. 399 Park Avenue New York, New York 10022	Executive Vice President	Chairman, Committee for Registrant
Edward L. Palmer 399 Park Avenue New York, New York 10022	Executive Vice President	None
William I. Spencer 55 Wall Street New York, New York 10015	Executive Vice President	None
Thomas R. Wilcox 399 Park Avenue New York, New York 10022	Executive Vice President	None
Walter B. Wriston 399 Park Avenue New York, New York 10022	Executive Vice President	None
Bernard T. Stott 399 Park Avenue New York, New York 10022	Comptroller	None
Delmont K. Pfeffer 55 Wall Street New York, New York 10015	Senior Vice President	None

Carl W. Desch 399 Park Avenue New York, New York 10022	Senior Vice President and Cashier	None
Leif H. Olsen 399 Park Avenue New York, New York 10022	Senior Vice President and Economist	None
E. Sherman Adams 399 Park Avenue New York, New York 10022	Senior Vice President	None
John B. Arnold 399 Park Avenue New York, New York 10022	Senior Vice President	None
H. Lansing Clute 399 Park Avenue New York, New York 10022	Senior Vice President	None
G. A. Costanzo 399 Park Avenue New York, New York 10022	Senior Vice President	None
E. Newton Cutler, Jr. 399 Park Avenue New York, New York 10022	Senior Vice President	None
Loren A. Erickson 399 Park Avenue New York, New York 10022	Senior Vice President	None
John Exter 399 Park Avenue New York, New York 10022	Senior Vice President	None
Stephen C. Eyre 399 Park Avenue New York, New York 10022	Senior Vice President	None
Robert W. Feagles 399 Park Avenue New York, New York 10022	Senior Vice President	None
John F. Fitzgerald 399 Park Avenue New York, New York 10022	Senior Vice President	None

Henry M. Hubshman, Jr. 90 Park Avenue New York, New York 10016	Senior Vice President	None
James F. Jaffray 399 Park Avenue New York, New York 10022	Senior Vice President	None
Norris O. Johnson 399 Park Avenue New York, New York 10022	Senior Vice President	None
Homer C. Lathrop 399 Park Avenue New York, New York 10022	Senior Vice President	None
P. Henry Mueller 399 Park Avenue New York, New York 10022	Senior Vice President	None
Eben W. Pyne 399 Park Avenue New York, New York 10022	Senior Vice President	None
Juan D. Sanchez 399 Park Avenue New York, New York 10022	Senior Vice President	None
George C. Scott 399 Park Avenue New York, New York 10022	Senior Vice President	None
Joseph P. Shaw 399 Park Avenue New York, New York 10022	Senior Vice President	None
John C. Slagle 55 Wall Street New York, New York 10015	Senior Vice President	None
John E. Thilly 399 Park Avenue New York, New York 10022	Senior Vice President	None
Hulbert W. Tripp 399 Park Avenue New York, New York 10022	Senior Vice President	Member, Committee for Registrant

Alfred M. Vinton 399 Park Avenue New York, New York 10022	Senior Vice President	None

Item 33. *Compensation of Underwriters.*

Not applicable. First National City Bank has received no commissions or other compensation or profits from Registrant as of the date of filing.

Item 34. *Financial Statements and Exhibits.*

(a) No financial statements are filed. Registrant has no assets or liabilities and has never had any assets or liabilities.

(b) Exhibits:

1. Resolution of Board of Directors of First National City Bank establishing Registrant—filed as Exhibit A to Registrant's Registration Statement on Form S-5 under the Securities Act of 1933, filed the same day as this Registration Statement, to which reference is hereby made.

2. Preliminary Prospectus of Registrant —filed as Part I to Registrant's Registration Statement on Form S-5 under the Securities Act of 1933, filed the same day as this Registration Statement, to which reference is hereby made.*

3(a). Form of Authorization for Commingling of Agency Accounts (individual account)—filed as Exhibit B-1

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*A copy of the Final Prospectus of Registrant will be filed as Part I to Registrant's Registration Statement on Form S-5 by an amendment to such Registration Statement and when so filed is hereby incorporated by reference as an Exhibit to this Registration Statement.

to Registrant's Registration Statement on Form S-5 under the Securities Act of 1933, filed the same day as this Registration Statement, to which reference is hereby made.

3(b). Form of Authorization for Commingling of Agency Accounts (joint account)—filed as Exhibit B-2 to Registrant's Registration Statement on Form S-5 under the Securities Act of 1933, filed the same day as this Registration Statement, to which reference is hereby made.

4(a). Specimen of receipt issued to participants upon admission to original or additional participation—filed as Exhibit C-1 to Registrant's Registration Statement on Form S-5 under the Securities Act of 1933, filed the same day as this Registration Statement, to which reference is hereby made.

4(b). Specimen of receipt issued to participants upon partial termination of participation—filed as Exhibit C-2 to Registrant's Registration Statement on Form S-5 under the Securities Act of 1933, filed the same day as this Registration Statement, to which reference is hereby made.

5. Form of Management Agreement between Registrant and First National City Bank—filed as Exhibit D to Registrant's Registration Statement on Form S-5 under the Securities Act of 1933, filed the same day

as this Registration Statement, to which reference is hereby made.*

6. Form of Agreement between Registrant and First National City Bank relating to the availability of units of participation—filed as Exhibit E to Registrant's Registration Statement on Form S-5 under the Securities Act of 1933, filed the same day as this Registration Statement, to which reference is hereby made.*

SIGNATURE

Pursuant to the requirements of the Investment Company Act of 1940, the undersigned Registrant has caused this Registration Statement to be signed on its behalf in the City of New York and State of New York on the 20th day of April, 1966.

COMMINGLED INVESTMENT ACCOUNT OF
FIRST NATIONAL CITY BANK

By /s/ Robert L. Hoguet, Jr.
Robert L. Hoguet, Jr.
Chairman of Committee

Witness: /s/ Conrad F. Ahrens
Conrad F. Ahrens
Member of Committee

[U.S. Securities & Exchange Commission]
RECEIVED
April 20, 1966

*It is anticipated that the Management Agreement and the Agreement relating to the availability of units of participation will be signed prior to the proposed public offering of Registrant's units of participation. Copies of the executed Agreements will thereupon be filed as Exhibits to Registrant's Registration Statement on Form S-5 by an amendment to such Registration Statement and when so filed are hereby incorporated by reference as Exhibits to this Registration statement.

[Exhibit 7 to Affidavit of James F. Fitzpatrick Civ. Act. No. 1083-66 United States District Court for the District of Columbia]

EXHIBIT C-1

FIRST NATIONAL CITY BANK—COMMINGLED INVESTMENT ACCOUNT

YOUR ACCOUNT NUMBER	DATE OF TRANSACTION	FOR YOUR UNITS OWNED FULL	FOR YOUR UNITS OWNED PART	AMOUNT RECEIVED	VALUE PER UNIT	UNITS ACQUIRED FULL	UNITS ACQUIRED PART	PRESENT UNITS OWNED FULL	PRESENT UNITS OWNED PART

PARTICIPANT'S RECEIPT—NOT TRANSFERABLE

SPECIMEN

Received from the Participant the above AMOUNT RECEIVED for investment and commingling effectively with the funds of other customers of First National City Bank in the Commingled Investment Account (the "Commingled Account"), as provided for in the Declaration of Trust creating the Commingled Account and subscribed lawful investments thereof. Above UNITS ACQUIRED indicate the units of participation in the Commingled Account which are registered in the Participant's name on account of the funds so received.

PARTICIPANT

FIRST NATIONAL CITY BANK
COMMINGLED INVESTMENT ACCOUNT
[illegible]

BY

(Note: This receipt should be surrendered to the Bank upon any termination or whole or in part of the participation evidenced hereby. In the event of partial termination, a new receipt will be issued for the appropriate number of units.)

[Exhibit 8 to Affidavit of James F. Fitzpatrick Civ. Act. No. 1083-66 United States District Court for the District of Columbia]

EXHIBIT C-2

FIRST NATIONAL CITY BANK—COMMINGLED INVESTMENT ACCOUNT

TERMINATION DATE	PREVIOUS UNITS OWNED			UNITS TERMINATED		PRESENT UNITS OWNED		UNITS TERMINATED		VALUE PER UNIT	CHECK ENCLOSED
MO.	DAY	YR.	FULL	PART	FULL	PART	FULL	PART			

YOUR ACCOUNT NO.

PARTICIPANT'S RECEIPT—NOT TRANSFERABLE

SPECIMEN

In accordance with written notice of termination, the Participant's participation in the Commingled Investment Account ("Commingled Account") has been reduced by the number of UNITS TERMINATED, leaving registered in the Participant's name the above PRESENT UNITS OWNED, if any. In the event of complete termination, PRESENT UNITS OWNED is 000/000, and there is no continuing participation in the Commingled Account. Otherwise the participation continues to be invested and reinvested collectively with the funds of other customers of First National City Bank in the Commingled Account, as provided for in the current Prospectus of the Commingled Account and subsequent lawful amendments thereof.

FIRST NATIONAL CITY BANK
COMMINGLED INVESTMENT ACCOUNT
POST OFFICE BOX 3120, GRAND CENTRAL STATION
NEW YORK, N.Y. 10017

BY _____

(NOTE: This receipt should be surrendered to the Bank upon any termination in whole or in part of the participation evidenced hereby. In the event of partial termination, a new receipt will be issued for the appropriate number of units.)

[Exhibit 9 to Affidavit of James F. Fitzpatrick Civ. Act. No. 1083-66 United States District Court for the District of Columbia]

[Letterhead of the First National City Bank]

April , 1966

To: Committee for Commingled Investment Account

This will confirm the arrangements for management, supervision and custody of the funds of customers invested through the Commingled Investment Account (the "Commingled Account"), as follows:

1. *Investment Management Services.* First National City Bank (the "Bank") will manage the investment and reinvestment of funds in the Commingled Account. Specifically, the Bank will maintain a continuous investment program for the Commingled Account, not inconsistent with its investment policy as set forth in the registration statement of the Commingled Account, as from time to time amended, under the Investment Company Act of 1940 and in the prospectus of the Commingled Account currently in use under the Securities Act of 1933. The Bank will determine what securities are to be purchased or sold for the Commingled Account and will execute transactions for the Commingled Account accordingly. The Commingled Account will have the benefit of the investment analysis and research, the review of current economic conditions and trends and the consideration of long-range investment policy now generally available to investment advisory customers of the Bank. The Bank will determine what portion, if any, of the Commingled Account should be held uninvested and what portion, if any, should be invested in Government obligations.

2. *Allocation of Costs and Expenses.* Members of your Committee who are officers or employees of the Bank shall receive no separate compensation for their services for the

Commingled Account. The Bank shall, however, reimburse the Commingled Account for such compensation and expenses, if any, as the Committee shall have authorized to be paid out of the Commingled Account to any member who is not an officer or employee of the Bank. The Bank will furnish, without expense to the Commingled Account, such administrative and clerical services, including the calculations of asset value, that are required to be made for the Commingled Account, and such office space and facilities as may be required, and will maintain up-to-date records of the Participants in the Commingled Account, their addresses and the extent of their participations. Except to the extent required by the Comptroller of the Currency to be paid by the Bank, the following amounts will be paid directly from the Commingled Account:

(a) brokers' commissions,

(b) cost of independent professional services, such as legal, auditing or accounting services,

(c) taxes or governmental fees attributable to transactions for the Commingled Account or to income from Commingled Account assets,

(d) cost of maintaining the registration and qualification of the Commingled Account under laws administered by the Securities and Exchange Commission or under other applicable regulatory requirements (except that the cost of printing, publication and distribution of current reports to Participants will be paid by the Bank), and

(e) cost of preparation and distribution of notices to Participants and proxy statements. The Commingled Account shall in no event be charged with any costs, fees or other expenses arising in connection with the organization of the Commingled Account, including its initial registration and qualification under the Investment Company Act of 1940 and under the Securities Act of 1933, the initial determination of its tax status and any rulings obtained for this purpose, its initial registration and quali-

fication under the laws of any State or its approval by the United States Comptroller of the Currency or any other Federal authority, and all of such costs, fees and expenses have been or will be paid by the Bank.

3. *Custody and Safekeeping.* The Bank will have custody of and keep safely at all times the assets of the Commingled Account. Securities included among such assets (other than bearer securities) shall be registered in the name of the Bank or one of its registered nominees, with or without indication of fiduciary capacity. The Bank shall be fully responsible for the fidelity and liabilities of any such nominee.

4. *Transactions in the Account.* All transactions of purchase or sale for the Commingled Account shall be promptly reported to the Committee by the Bank. Except for (i) exchanges of securities held in the Commingled Account for other securities in connection with any properly authorized reorganization, recapitalization, merger, consolidation, split-up or combination of shares, change of par value, conversion or otherwise, (ii) any exchange of securities in temporary form for securities in definitive form, (iii) the surrender of bonds or other obligations at maturity or when called for redemption, or (iv) the surrender of securities to representatives of all holders of securities of the same class for their protection in reorganization or similar proceedings, securities held for the Commingled Account shall be delivered only against payment

(a) in lawful money of the United States paid to the Bank or its agent,

(b) by certified check upon, or treasurer's or cashier's check of, a New York bank delivered to the Bank or its agent, or

(c) if delivery is made in New York, by credit to the account of the Bank or its agent by the New York Stock Clearing Corporation,

provided, however, that the Bank or its agent may accept an uncertified check in the case of any transaction where

the payment involved does not exceed $1,000. Orders to sell securities for the Commingled Account will be placed only with established brokers or dealers. The Bank will maintain in its Custodian Department one or more cash accounts, identified as assets of the Commingled Account and subject only to draft or order by the Bank as custodian or agent. All monies received by the Bank by or for the Commingled Account shall be deposited in said account or accounts.

5. *Collections.* The Bank will collect, receive and deposit for the Commingled Account all income and other payments with respect to the securities in the Commingled Account, will execute ownership and other certificates and affidavits for all federal, state or local tax purposes, and will take all other action necessary in connection with the collection, receipt and deposit of such income and other payments, including but not limited to the presentation for payment of all coupons and other income items requiring presentation on all securities which may mature or be called, redeemed, retired or otherwise become payable and the endorsement for collection by the Commingled Account of all checks, drafts or other negotiable instruments. The Bank will receive and collect all stock dividends, rights and other similar items.

6. *Distributions to Participants.* The Bank will, in accordance with instructions of the Committee, act as paying or disbursing agent for all funds distributed to Participants whether as income, profits, amounts payable on termination, or otherwise.

7. *Proxies, Notices, etc.* The Bank will promptly transmit to the Committee all notices, proxy forms and proxy statements and all other requests and announcements furnished to the Bank or its nominee as registered holder of securities in the Commingled Account and will execute and deliver or cause its nominee to execute and deliver such proxies or other authorizations in such manner as the Committee shall direct.

8. *Disbursements.* In so far as funds are available in the Commingled Account for the purpose, the Bank will disburse from such funds amounts required to pay such bills, statements and other obligations as are payable out of the Commingled Account pursuant to the provisions of paragraph 2 hereof or as are otherwise approved by the Committee, such approval to be evidenced by the record of the minutes of a meeting of the Committee or by the signature of two members thereof.

9. *Books, Records and Accounts.* The Bank will maintain proper books of account and complete records of all transactions in the Commingled Account (whether in the investment account or the deposit account) and will render statements or copies thereof from time to time as requested by the Committee or as may otherwise be required by law. The Bank will assist in the preparation of reports to Participants, to the Securities and Exchange Commission, to the Comptroller of the Currency and to others, and in all audits of the Commingled Account.

10. *Compensation of the Bank.* For all services to be rendered and payments to be made by the Bank as described in this agreement, the Bank shall be entitled to withdraw from the Commingled Account as of the last day of each fiscal quarter and pay to itself a fee of 1/8th of 1% of the average of the net asset values of the Commingled Account taken on each valuation date throughout the quarter for purposes of determining the asset value of units of participation, and no more. If for any reason the determination of such asset value has been lawfully suspended for a period including any such quarter, the Bank's compensation payable at the end of such quarter shall be computed on the basis of the value of the net assets in the Commingled Account as last determined prior to such quarter.

11. *Avoidance of Inconsistent Positions.* In connection with purchases or sales of securities for the Commingled Account, neither the Bank nor any of its directors, officers or employees will act as a principal or agent or receive any

commissions. The Bank will not itself become a Participant in the Commingled Account. Where the Bank is called upon to give advice to its customers concerning the Commingled Account, it will act solely as investment adviser for such customers with disclosure of the position of the Bank with respect to the Commingled Account.

12. *Duration and Termination.* This agreement shall remain in force until December 31, 1967, and from year to year thereafter, but only so long as such continuance is approved at least annually either by the Committee, including specific approval by a majority of the Committee who are not persons affiliated with the Bank, or by the vote of Participants having a majority interest in the Commingled Account. This agreement may, on 60 days' prior written notice, be terminated at any time without the payment of any penalty, by the Committee, by the vote of Participants having a majority interest in the Commingled Account, or by the Bank. This agreement shall automatically terminate in the event of its assignment by the Bank or if it shall not be approved by Participants having a majority interest in the Commingled Account at the first meeting of the Participants. In interpreting the provisions of this paragraph 12, the definitions contained in Section 2(a) of the Investment Company Act of 1940 (particularly the definitions of "affiliated person" and "assignment") shall be applied, except that a "majority interest" in the Commingled Account shall mean more than 50% of the units of participation into which the Commingled Account is at the time divided.

13. *Amendments Hereof.* No provision of this agreement may be changed, waived, discharged or terminated orally, but only by an instrument in writing signed by the Bank, and no amendment of this agreement shall be effective until approved by the vote of Participants having a majority interest in the Commingled Account.

If the foregoing conforms to your understanding of the arrangements, please so indicate by signing the form of acceptance on the accompanying counterpart hereof.

FIRST NATIONAL CITY BANK

By_____

[Exhibit 10 to Affidavit of James F. Fitzpatrick Civ. Act. No. 1083-66 United States District Court for the District of Columbia]

[Letterhead of the First National City Bank]

April , 1966

To: Committee for Commingled Investment Account

This will confirm the arrangement for including in the Commingled Investment Account (the "Commingled Account") funds of customers of First National City Bank (the "Bank") as follows:

1. You agree that, except to the extent otherwise required by law or inconsistent with the provisions of the prospectus of the Commingled Account currently in use under the Securities Act of 1933 (the "Prospectus"), participation in the Commingled Account will at all times be available at the request of appropriate officers of the Trust and Investment Division of the Bank to persons who have validly appointed the Bank managing agent pursuant to an appropriate authorization for commingling of agency accounts as described in or attached to the Prospectus.

2. Participation in the Commingled Account will be available at net asset value, determined in accordance with the Prospectus.

3. The Bank agrees not to give any information or to make any representations with respect to the Commingled Account other than the information and representations contained in the Prospectus or related registration statement. The Bank further agrees to comply with all applicable restrictions of governmental authorities with respect to any publicity to be given to the Commingled Account and to the means by which participations in the Commingled Account are to be made available.

4. This agreement shall remain in force until December 31, 1967, and from year to year thereafter, but only so long as such continuance is approved at least annually either by the Committee, including specific approval by a majority of the Committee who are not persons affiliated with the Bank, or by the vote of participants having a majority interest in the Commingled Account. This agreement may, on 60 days' prior written notice, be terminated at any time without the payment of any penalty by the Committee, by the vote of participants having a majority interest in the Commingled Account, or by the Bank. This agreement shall automatically terminate in the event of its assignment by the Bank. In interpreting the provisions of this paragraph 4, the definitions contained in section 2(a) of the Investment Company Act of 1940, particularly the definitions of "affiliated person" and "assignment", shall be applied, except that a "majority interest" in the Commingled Account shall mean more than 50% of the units of participation into which the Commingled Account is at the time divided.

5. No provision of this agreement may be changed, waived, discharged or terminated orally, but only by an instrument in writing signed by the Bank.

6. This agreement has been entered into in view of the Securities and Exchange Commission's position that the Bank be regarded as statutory principal underwriter of the Commingled Account. By entering into this agreement, the Bank does not concede that it is the principal underwriter of the Commingled Account.

If the foregoing conforms to your understanding of the arrangement, please so indicate by signing the form of acceptance on the accompanying counterpart hereof.

FIRST NATIONAL CITY BANK

By_____

The foregoing is confirmed and accepted as of the _____.

[Exhibit 10 (continued) to Affidavit of James F. Fitzpatrick Civ. Act. No. 1083-66 United States District Court for the District of Columbia]

[Letterhead of DeBevoise, Plimpton, Lyons & Gates]

April , 1966

Committee for the Commingled Investment
Account of First National City Bank
399 Park Avenue
New York, New York 10022

Dear Sirs:

We have acted as counsel for First National City Bank in the establishment of its Commingled Investment Account (the "Commingled Account") and are counsel for the Commingled Account. We have participated in the preparation of the Registration Statement on Form S-5 filed by the Commingled Account with the Securities and Exchange Commission under the Securities Act of 1933 on April , 1966, and the amendments thereto (the "Registration Statement"), with respect to 500,000 units of participation in the Commingled Account.

In so acting, we have made such examination of law and examined such records and documents as in our judgment

are necessary or appropriate to enable us to render the opinion expressed below.

We are of the following opinion:

1. The Commingled Account is a collective investment fund duly organized and existing pursuant to applicable regulations of the United States Comptroller of the Currency.

2. Upon admission of the funds of a participant to a participation in the Commingled Account, such participant will have a lawful, fully paid and nonassessable interest in the Commingled Account.

We hereby consent to the use of this opinion as an exhibit to the Registration Statement and to the use of our name as "Legal Counsel" in the Prospectus constituting Part I of the Registration Statement. In giving such consent, we do not thereby admit that we are within the category of persons whose consent is required under Section 7 of the Securities Act of 1933 or the Rules and Regulations of the Securities and Exchange Commission thereunder.

Very truly yours,

[Exhibit 12 to Affidavit of James F. Fitzpatrick Civ. Act. No. 1083-66 United States District Court for the District of Columbia]

PROSPECTUS / JUNE 14, 1966

COMMINGLED INVESTMENT ACCOUNT of FIRST NATIONAL CITY BANK

Purpose

To make First National City Bank's investment advisory services available to investors with $10,000 or more.

Investment Policy

To invest principally in common stocks and convertible securities offering opportunity for long-term growth of capital and of income.

Participations

Participations acquired and withdrawn at net asset value.

No charge for admission or withdrawal — each dollar received participates in full.

Minimum participation accepted—$10,000.
Optional additions—$1,000 or more.

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

COMMINGLED INVESTMENT ACCOUNT

of

FIRST NATIONAL CITY BANK

Purpose

In order to make its investment advisory services and experience in managing equity portfolios available to a larger number of customers, First National City Bank (the "Bank") accepts custody and investment discretion as to accounts with a minimum amount of $10,000 pursuant to an agreement signed by the customer authorizing the Bank to invest such funds, together with the funds of other customers who have given the Bank the same authority, in a single collective account (the "Commingled Account") in which each such customer shares in proportion to the amount of his funds which are included. (A detachable form of authorization for an individual account is included in this Prospectus at page 13.)

Supervision and Management

Supervision of the Commingled Account is in the hands of a committee (the "Committee") of three officers in the Trust and Investment Division of the Bank together with two individuals who are not affiliated with the Bank. The Bank is responsible for the management of the investments in the Commingled Account, as more fully described under the heading "Management Services", and the full facilities and resources of the Bank are available for investment analysis and research, review of current economic conditions and trends, and consideration of long-range investment policy.

Investment Policy

The policy of the Commingled Account is to invest in securities which offer the opportunity for long-term growth of capital and of income. Investments are made principally in common stocks and in securities convertible into common stocks, but, depending upon the interpretation by the Bank's Trust and Investment Division of business, economic and market conditions, all or part of the funds of the Commingled Account may be invested at any time in other securities, including corporate preferred stocks, bonds, debentures or other evidences of indebtedness, and obligations issued or guaranteed by the United States or an instrumentality thereof.

The funds in the Commingled Account are invested in a carefully selected portfolio diversified among various industries, and it is not intended to concentrate more than 25% of the Commingled Account in investments in any one particular industry. Purchases and sales of securities will be made on the basis of investment considerations and not for short-term profit.

The foregoing investment policies and the investment restrictions stated below may be changed only when permitted by law and consented to by the vote of a majority of the units of participation in the Commingled Account.

Investment Restrictions

Funds in the Commingled Account will not be used in the underwriting of securities, or applied to the purchase of real estate, interests in real estate investment trusts, commodities or commodity contracts, or invested in companies for the purpose of exercising control or management, or invested in

the securities of investment companies. Funds in the Commingled Account will not be lent to others, although they may be applied to the purchase of bonds and debt securities of a type publicly distributed or customarily purchased by institutional investors. The Commingled Account will not acquire any security or other property if immediately after such acquisition and as a result thereof the following requirements would not be met: at least 75% of the total assets in the Commingled Account taken at market value are represented by cash and cash items, securities issued or guaranteed by the United States or an instrumentality thereof and other securities which, as to any one issuer, do not represent more than 10% of the voting securities of such issuer or more than 5% of the value of the total assets in the Commingled Account. The Commingled Account will not engage in margin transactions or short sales, participate in a joint trading account, or borrow money.

The Commingled Account is also subject to applicable rules and regulations of the United States Comptroller of the Currency and is registered under the Investment Company Act of 1940. Such registration does not involve any supervision by the Securities and Exchange Commission of the management or investment practices or policies of the Commingled Account.

Units of Participation

For convenience in determining the proportionate interest in the Commingled Account of each participating customer ("Participant"), the Commingled Account is divided into units of equal value, and the proportionate interest of each Participant is expressed by the number of such units allocated to such Participant. (In the case of joint accounts, the term "Participant" refers to both customers or the survivor of them.) Each unit represents an equal interest in the Commingled Account and no unit has priority or preference over any other with respect to any liquidation of the Commingled Account or any other rights or privileges. The total number of units of participation is not limited. Fractions of units, carried out to three decimal places, are used, and references to a "unit" or "units" include the fraction or fractions thereof, if any. No Participant has or is deemed to have exclusive ownership of any particular asset or investment of the Commingled Account.

A receipt is issued to each Participant showing the units of participation credited to his account. The receipts are not themselves transferable. Units of participation may be transferred only to persons who have validly appointed the Bank as managing agent, by application to the Bank accompanied by the surrender of a receipt covering the units to be transferred. Transfer of less than the total participation of a Participant is permitted only if the aggregate net asset value both of the units remaining in the transferor's account and of the units in the transferee's account after the transfer is not less than $10,000 each.

Determination of Net Asset Value

The original value of each unit of participation upon the establishment of the Commingled Account was arbitrarily set at $10, and Participants included prior to 12:00 midnight, New York time, June 13, 1966, acquired one unit for every $10 invested. Thereafter, the net asset value of each unit is determined as of the close of business on each of the specified valuation dates by dividing the net asset value of the Commingled Account as of the close of business on such valuation date by the number of units of participation then outstanding, the result being adjusted to the nearer cent.

The valuation dates as of which the net asset alue of the Commingled Account is determined e: (*a*) every Tuesday (commencing Tuesday, ne 14, 1966), if a day (a "Business Day") which both the Bank and the New York ock Exchange are open for business, or if t a Business Day, then the next succeeding y which is a Business Day, (*b*) any other day ommencing Wednesday, June 15, 1966) as of hich the net asset value of the Commingled ccount is determined for the purpose of permitng terminations as provided under the heading Termination of Participations", and (*c*) in any vent, on the last day of February, May, August nd November in each year. The Committee hall be free at any time and from time to time change the valuation dates described in clause (*a*) above upon 30 days' notice to the Particiants, provided that the frequency of such valuaion dates shall not be decreased to less than a eekly basis without the consent of Participants aving at the time of consent more than 50% of he units of participation.

The net asset value of the Commingled Acount is an amount which reflects calculations ade as follows (with estimates used where ecessary or appropriate):

(1) A security listed on a national stock exchange is valued on the basis of prices or quotations on such exchange on the valuation date, or if such exchange is not open on such date, then on the basis of prices or quotations on such exchange on the next preceding date on which such exchange was open. If sales are reported for the date as of which the security is to be valued pursuant to the preceding sentence, the security is valued at its last sale price on such date; if no sales are reported for such date, the security is valued at the mean of the closing asked and bid prices on such date. (If a security is listed on two or more national stock exchanges, one of which is either the New York Stock Exchange or the American Stock Exchange, the prices or quotations on the New York Stock Exchange or American Stock Exchange are used.)

(2) A security which is not listed on a national stock exchange but which is traded in the over-the-counter market is valued at the mean of the closing asked and bid prices on the valuation date (or on the next preceding date for which such prices are available if not available for the valuation date) supplied by two or more dealers making a primary market in such security. Every other asset of the Commingled Account is valued at its fair market value as of the close of business on the valuation date, determined either by reference to values supplied by a generally accepted pricing or quotation service or by taking into consideration quotations furnished by one or more reputable sources, such as pricing or quotation services, securities dealers, brokers or investment bankers, values of comparable property, appraisals or such other information or circumstances as the Committee considers relevant.

(3) An investment purchased and awaiting payment against delivery is included for valuation purposes as a security held, and an account payable is set up to reflect the purchase price, including brokers' commissions and other expenses incurred in the purchase thereof but not disbursed as of the valuation date.

(4) An investment sold but not delivered pending receipt of proceeds is valued at the net sales price.

(5) Brokers' commissions, taxes and other expenses which may be incurred in connection with the future purchase or sale of portfolio securities as a result of admissions to or terminations of participation occurring as of the valuation date are not considered in valuing the assets of the Commingled Account as of such valuation date.

(6) Uninvested cash is valued at its face amount.

(7) The value of any dividends, including stock dividends, or rights which may have been declared on securities in the portfolio but not received by the Commingled Account as of the close of business on the valuation date are included as an asset of the Commingled Account if the security upon which such dividends or rights were declared is included and is valued ex-dividend or ex-rights.

(8) Interest accrued on any interest-bearing security in the portfolio is included as an asset of the Commingled Account if such accrued interest is not otherwise included in the valuation of the underlying security. Other accrued income is also included to the date of calculation.

(9) All reserves, liabilities, expenses, taxes and other charges due or accrued which in the discretion of the Committee are properly chargeable to the Commingled Account up to the date of calculation are deducted. An estimate of the fee chargeable by the Bank for investment management and other services and accrued to date is included as an expense.

(10) Each admission to and termination of a participation is reflected no later than in the calculation of net asset value as of the first valuation date following the valuation date as of which such admission or termination takes place, but no such admission or termination taking place as of a valuation date is taken into consideration in the calculation of net asset value for such date.

The computation of the net asset value of the Commingled Account and of the units of participation which is made as of each valuation date is completed within the two Business Days next following such date.

Admission to the Commingled Account

Each admission to participation in the Commingled Account is made on the day the written request of the Bank for such admission is received by the Committee, if such day is both a valuation date and a Business Day, or, if such day is not both a valuation date and a Business Day, on the next succeeding day which is both, and is made on the basis of the net asset value of the units of participation as determined for the valuation date on which admission is made.

The minimum acceptable initial participation by any Participant is $10,000. Except for participations resulting from distributions of net long-term capital gains (see "Distributions and Federal Tax Status"), each subsequent additional participation by a Participant must be at least $1,000. In no event, however, will a participation be accepted if immediately after making such investment the Participant would hold units of participation the aggregate net asset value of which would exceed either (*a*) $500,000 or (*b*) 10% of the then net asset value of the Commingled Account.

The Bank may not itself become a Participant.

Termination of Participations

A participation may be terminated in whole or in part, on the basis of the net asset value of the units of participation being terminated and without any charge for termination, pursuant to an irrevocable written notice of termination, accompanied by the receipt or receipts issued to the Participant with respect to the units of participation being terminated, delivered to any office of the Bank in the State of New York on any day on which the Bank is open for business. However, no Participant may terminate less than all of his units of participation in any case where the aggregate net asset value of the units remaining would be less than $10,000. If delivery of a notice of termination, accompanied by the receipt or receipts issued with respect to the units of participation being terminated, is made before 1:00 P.M. (New York City time) on a Business Day, the net asset value is determined as of the close of business

on that day. If such delivery is made after 1:00 P.M. on a day which is a Business Day or is made at any time during a day when the Bank is open but the New York Stock Exchange is not open, the net asset value is determined as of the close of business on the next day on which the New York Stock Exchange is open. The value of units of participation on termination may be more or less than the Participant's cost, depending on the market value of the securities held by the Commingled Account at the time of termination.

If the Bank is notified of the death or adjudicated incompetency of any Participant (or, in the case of a joint account, the death or adjudicated incompetency of both persons creating such account or the survivor of them), such notification shall be treated as a notice of termination of the participation owned by such Participant. Such notice of termination need not be accompanied by the receipt or receipts issued to the Participant with respect to the units of participation being terminated, but the Bank shall use its best efforts to have such receipt or receipts surrendered as soon as reasonably practicable thereafter.

Distributions upon termination of participations normally will be made in cash within seven days of the day on which the notice of such termination is delivered to the Bank. However, if in its sole discretion the Committee deems it advisable or necessary, such distributions may be made in kind, or partly in cash and partly in kind.

Any distribution upon termination as the result of the death or adjudicated incompetency of a Participant shall be held by the Bank at the Bank's expense in such Participant's individual investment advisory account until such time as such Participant's legal representative shall have been appointed and shall have furnished proof satisfactory to the Bank of his right to receive such distribution. The Bank shall to the extent practicable keep all cash in such accounts invested in United States Treasury bills but shall not otherwise invest or reinvest the assets of such accounts or be obligated to take any other action in respect thereof.

The right to terminate a participation or to receive a distribution with respect to any such termination within seven days as stated above may be suspended for any period during which trading on the New York Stock Exchange is restricted or such Exchange is closed (other than customary weekend and holiday closings), for any period during which an emergency exists as a result of which disposal of portfolio securities or determination of the net asset value of the Commingled Account is not reasonably practicable, and for such other periods as the Securities and Exchange Commission may by order permit. If at the time of any suspension of the right to receive distributions a Participant shall have given a notice of termination but shall not yet have received a distribution, such Participant shall have the right to withdraw the notice of termination.

Distributions and Federal Tax Status

Cash distributions from the net investment income, if any, of the Commingled Account will be made to the Participants, ratably on their units of participation, at least quarter-annually. In the event of realized capital losses, distributions of investment income may result in a return of capital. It is the policy of the Committee to distribute each year substantially all of the net income (including the excess, if any, of net short-term capital gain over net long-term capital loss) of the Commingled Account. For Federal income tax purposes, each such distribution will be taxable to each Participant as ordinary income.

Distribution of net long-term capital gains realized from the sale of securities in the Commingled Account will be made to Participants, ratably on their units of participation, on an

annual basis shortly before or after August 31, the end of the Commingled Account's fiscal year. Such distributions will be paid in units of participation taken at their net asset value unless the Participant elects to receive payment entirely in cash, and will be taxable to each Participant, whether taken in units of participation or in cash, as long-term capital gain irrespective of the length of time he has been a Participant. To the extent that the net asset value of units of participation is reduced below a Participant's cost by distribution of net long-term capital gain realized on the sale of securities, such distribution is in effect a return of capital, although taxable as stated above. Distributions of net long-term capital gain are not eligible for the $100 dividend-received exclusion.

The Commingled Account expects to qualify as a "regulated investment company" within the meaning of the Internal Revenue Code. (Such regulation does not involve supervision of management or investment practices or policies.) As such, and by complying with the provisions of the Code applicable to regulated investment companies, the Commingled Account will be relieved of liability for Federal income tax on net income and net long-term capital gains which are distributed.

Management Services

The Commingled Account is managed by the Bank pursuant to a management agreement (subject to the approval of the Participants at their first annual meeting, scheduled for November 16, 1966). The agreement provides that the Bank will maintain a continuous investment program for the Commingled Account, not inconsistent with its stated investment policy, will determine what securities are to be purchased or sold for the Commingled Account and will execute transactions for the Commingled Account accordingly. The agreement further provides that the Bank agrees to furnish all custodian, administrative and clerical services, office space and facilities required for the operation of the Commingled Account and to reimburse the Commingled Account for the compensation and expenses, if any, paid by the Commingled Account to the members of the Committee. The Bank also agrees to pay all costs and expenses arising in connection with the organization of the Commingled Account, including its initial registration and qualification under the Federal securities laws and under other applicable regulatory requirements, but the cost of maintaining such registration and qualification (other than the cost of printing, publication and distribution of current reports to Participants, which will be paid by the Bank) will be an expense of the Commingled Account. The cost of independent professional services, such as legal, auditing or accounting services (other than in connection with the organization of the Commingled Account), and the cost of preparation and distribution of notices to Participants and proxy statements will also be expenses of the Commingled Account.

For the Bank's services, the Commingled Account is charged as of the last day of each fiscal quarter with a fee payable to the Bank equal to ⅛ of 1% of the average of the net asset values of the Commingled Account taken on each valuation date during such quarter (or approximately ½ of 1% on an annual basis).

The management agreement is renewable annually after December 31, 1967, provided that such continuance is approved annually by the Committee, including a majority of the members of the Committee who are not affiliated with the Bank, or by the vote of Participants having more than 50% of the units of participation. The agreement may, on sixty days' notice, be terminated by the Committee, by the vote of a majority of the units of participation as set forth in the agreement or by the Bank, and will terminate automatically if assigned by the Bank. Amendments of the agreement must be approved by the Comptroller of the Currency and by the vote of Participants having more than 50% of the units of participation.

Brokerage Commissions

In placing orders for the purchase and sale of portfolio securities for the Commingled Account pursuant to the management agreement, the Bank's primary objective is to obtain the most favorable prices and execution of orders available. While there is no undertaking or agreement to do so, it is the Bank's practice to place a major portion of such brokerage business with brokers and dealers who supply supplementary research and statistical information or market quotations to the Bank as the Commingled Account's investment adviser. This practice is not followed if as a result the Commingled Account would not obtain the most favorable prices and execution. The Bank does not believe that its expenses in furnishing investment management will be significantly affected by the receipt of such research and statistical information and market quotations. There is no intention to place portfolio transactions with any particular brokers or dealers or group thereof.

Members of the Committee

The members of the Committee are as follows:

ROBERT L. HOGUET, JR., *Chairman*
399 Park Avenue, New York, N. Y.
Executive Vice President of First National City Bank in charge of the Bank's Trust and Investment Division and Chairman of its Investment Policy Committee.

CONRAD F. AHRENS
399 Park Avenue, New York, N. Y.
Vice President of First National City Bank in charge of the Investment Research Department of the Bank's Trust and Investment Division and a member of its Investment Policy Committee.

JOHN D. LOCKTON
570 Lexington Avenue, New York, N. Y.
Treasurer of the General Electric Company, Chairman of the Trustees of the General Electric Pension Trust and other General Electric trusts, and a Trustee of the Elfun Trusts, a mutual fund for General Electric employees.

PAUL SAUREL
300 Park Avenue, New York, N. Y.
A partner of the law firm of Morris & McVeigh.

HULBERT W. TRIPP
399 Park Avenue, New York, N. Y.
Senior Vice President of First National City Bank in the Bank's Trust and Investment Division and a member of its Investment Policy Committee since January 1965. Member of the Bank's Trust Board since 1963. Financial Vice President of the University of Rochester prior to January 1965, and since that date, Chairman of its Investment Committee.

All positions shown have been held for more than five years unless otherwise indicated, except that Messrs. Hoguet and Ahrens have been associated with the Bank in responsible positions for more than five years, although not at all times in the positions shown.

No compensation is paid out of the Commingled Account to any of the members of the Committee who are affiliated with the Bank. The Committee determines the compensation paid to the members of the Committee who are not affiliated with the Bank, and the Commingled Account is reimbursed by the Bank. It is expected that the members of the Committee who are not affiliated with the Bank will in the aggregate receive fees of $5,000 during the Commingled Account's first fiscal year ending August 31, 1966, and fees of $10,000 for the succeeding full fiscal year.

Meetings of Participants

A meeting of Participants for electing members of the Committee and approving the appointment of auditors for the year and for transacting other business is held annually at 11:00 A.M. on the third Wednesday in November, if not a legal holiday, or, if a legal holiday, then on the next succeeding day not a legal holiday. Special meetings of Participants may be called at any time by any member of the Committee.

All Participants' meetings are held at 399 Park Avenue, New York City, unless a different place of meeting within the City of New York is specified in the notice of the meeting. Notice of the time, place and purpose or purposes of each meeting is mailed, at least 20 days, but not more than 50 days, prior to the meeting, to each Participant, at his address as it appears on the books of the Bank at the time of such mailing, except that persons becoming Participants after the mailing of such notice receive notice of the meeting at the time they become Participants. Notice of any adjourned meeting need not be given.

Each Participant is at every meeting of Participants entitled to such number of votes, in person or by proxy, as is equal to the number of units of participation (including fractions of units) held by such Participant.

All matters are decided by a vote of the majority of the votes validly cast except as otherwise specified in this Prospectus or in any agreement which by its terms requires a higher vote for the approval, continuance or termination of such agreement and except as otherwise required by provisions of the Investment Company Act of 1940. The right to vote by proxy exists only if the instrument authorizing such proxy to act has been executed in writing by the Participant or by his duly authorized attorney.

The presence at any Participants' meeting, in person or by proxy, of Participants holding units of participation aggregating a majority of the total number of units constitutes a quorum for the transaction of business. In the absence of a quorum, a majority in interest of the Participants present in person or by proxy, or if no Participant is present in person or by proxy, any member of the Committee present, may adjourn the meeting *sine die* or from time to time. Any business that might have been transacted at the meeting originally called may be transacted at any adjourned meeting at which a quorum is present.

Election of Members of the Committee

The Committee consists of five members. The number of members may be increased or decreased by resolution of the Committee or action of the Participants, provided that the number shall not be less than five. Each member (whenever elected) holds office until his successor has been elected and qualified unless he resigns or his office becomes vacant by his death or removal.

At least 40% of the members of the Committee at all times will be persons who are not affiliated with the Bank (except as otherwise temporarily permitted by the provisions of the Investment Company Act of 1940 in the case of death, disqualification or bona fide resignation). The members of the Committee are elected annually, by a plurality of the votes cast at such election, at the annual meeting of Participants, or, in the event of any failure to elect the members at the annual meeting, at a special meeting of Participants, provided that the notice of such special meeting shall mention such purpose.

If any vacancy occurs in the Committee by reason of death, resignation, removal or otherwise, or if the authorized number of members of the Committee is increased, the members then in office continue to act, and such vacancies or newly created memberships (if not previously filled by the Participants at an annual or special meeting) may be filled by a majority vote of the

embers then in office, although less than a quo-um, provided that immediately after filling such acancy at least two-thirds of the members then olding office have been elected to such office y the Participants. In the event that at any ime (other than the time preceding the first nnual meeting of Participants) less than a majority of the members holding office at that time were so elected by the Participants, a meeting of the Participants shall be held promptly, and in any event within 60 days, for the purpose of electing members to fill any existing vacancies in the Committee unless the Securities and Exchange Commission shall by order extend such period.

Accounting Records, Audits and Financial Reports

The accounting records of the Commingled Account are kept on the basis of a fiscal year ending on the last day of August of each year.

At least semi-annually, the accounting records of the Commingled Account are audited by Haskins & Sells, or other independent public accountants selected in accordance with the provisions of the Investment Company Act of 1940. The compensation and expenses of the auditors are charged against and payable out of the assets of the Commingled Account.

The Commingled Account, at least semi-annually, transmits to Participants reports, based on the audit, containing such financial statements and other information as is required by applicable laws and regulations. The cost of printing, publication and distribution of such reports to Participants is borne by the Bank.

Termination of the Commingled Account

The Commingled Account will continue without limitation of time, provided that the Committee may, if authorized by the vote of Participants having more than 50% of the units of participation, at any time terminate the Commingled Account. (See, however, "Litigation" below.) Thereafter, no further moneys shall be admitted to a participation and no terminations shall be permitted, and the Committee shall, after all expenses and liabilities of the Commingled Account are paid or satisfied, distribute at one time or from time to time the assets of the Commingled Account to the Participants, either in cash or in kind, or partly in cash and partly in kind.

Status of the Commingled Account

The Commingled Account was established in the State of New York on September 21, 1965 and is operated as a collective investment fund pursuant to applicable regulations of the Comptroller of the Currency. The Commingled Account is also deemed to be an investment company of the diversified, open-end management type, and the Bank may be deemed to be its statutory underwriter.

Litigation

Two legal proceedings are pending which might affect the status of the Commingled Account. The first, against the Comptroller of the Currency, was brought on April 25, 1966. The Investment Company Institute (an association of investment companies, investment advisers to investment companies and underwriters of investment company securities) and five of its members filed a complaint in the United States District Court for the District of Columbia against the Comptroller, asking the court to set aside the Comptroller's regulation and the specific approval thereunder pursuant to which the Commingled Account is operated, on the

ground that the Comptroller has unlawfully authorized activities which violate certain provisions of the Banking Act of 1933 aimed at divorcing commercial and investment banking and which are not permitted to banks organized under New York State law. Neither the Bank nor the Commingled Account was named as a party in the complaint.

The second suit was commenced on May 5, 1966 by the National Association of Securities Dealers, Inc. (an association of brokers and dealers in over-the-counter securities, including the shares of open-end investment companies). The NASD filed a petition in the United States Court of Appeals for the District of Columbia Circuit asking the court to review and set aside certain orders of the Securities and Exchange Commission granting the Commingled Account exemptions from the provisions of Sections 10(b)(2), 10(b)(3) and 10(c) of the Investment Company Act of 1940 so as to permit a majority of the members of the Committee to be persons who are affiliated with the Bank. The petition for review alleges that the Commission exceeded its authority by granting exemptions which nullify fundamental statutory policy and that the Commission failed to give proper consideration to an argument raised by the NASD in the course of the administrative proceedings to the effect that the Committee will not exercise the directorial functions contemplated by the Investment Company Act of 1940. The Bank has moved to intervene in this proceeding.

A decision adverse to the Comptroller of the Currency in the first case or the Securities and Exchange Commission in the second might necessitate the termination of the Commingled Account and the distribution of its net assets or the resignation of the members of the Committee who are affiliated with the Bank and the termination by the Bank of the management agreement.

June 14, 1966

ROBERT L. HOGUET, JR., *Chairman*
CONRAD F. AHRENS
JOHN D. LOCKTON
PAUL SAUREL
HULBERT W. TRIPP
Members of the Committee

Commingled Investment Account of First National City Bank

Statement of Assets and Liabilities — June 2, 1966

Assets

Cash, held by First National City Bank	$220,000
Committee fees receivable from First National City Bank	2,500
	$222,500

Liabilities

Fees due unaffiliated Committee members	2,500
Contingencies (see note)	
Net assets applicable to units of participation outstanding	$220,000
Net asset value per unit of participation ($220,000 ÷ 22,000 units outstanding; 500,000 units registered)	$ 10.00

Note—Information pertaining to pending legal proceedings is given in the Prospectus under the heading "Litigation".

Opinion of Independent Certified Public Accountants

To the Committee and Participants of the
Commingled Investment Account of
First National City Bank:

We have examined the Statement of Assets and Liabilities of the Commingled Investment Account of First National City Bank as of June 2, 1966. Our examination was made in accordance with generally accepted auditing standards and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the accompanying Statement of Assets and Liabilities presents fairly the financial position of the Commingled Investment Account of First National City Bank at June 2, 1966, in conformity with generally accepted accounting principles.

HASKINS & SELLS

New York
June 6, 1966

AUTHORIZATION FOR COMMINGLING OF AGENCY ACCOUNTS

To: FIRST NATIONAL CITY BANK
P. O. Box 3130, Grand Central Station
New York, N. Y. 10017

In order to obtain your investment management services, I hereby constitute you my attorney and managing agent with discretion as to the investment of any funds at any time held in my investment advisory account with you. You may invest such funds, together with the funds of other customers who have given you the same authority, through a single collective account (the "Commingled Account") consisting of cash and securities in your custody and described in the current Prospectus for the Commingled Account, a copy of which I have received and by the provisions of which I agree to be bound. Except as otherwise required by the Investment Company Act of 1940 or any rule or regulation of the Securities and Exchange Commission thereunder or by any regulation or ruling of the Comptroller of the Currency of the United States, you may as my attorney and agent make any changes in the management or operation of the Commingled Account.

Your authority to act under this letter shall continue until revoked in writing by me or until my death or adjudicated incompetency. It is understood that you shall not, however, be liable for continuing to act after my death or incompetency if you shall not have received notice thereof. If your authority to act under this letter shall be terminated while my account is invested through the Commingled Account, my participation in the Commingled Account shall be terminated and liquidated in the manner described in the Prospectus of the Commingled Account current at the time of such termination.

_____ _____
(Date) (Signature)

Please Print:

NAME _____ | | | |
(First) (Middle) (Last) Social Security Number or Taxpayer Identification Number

ADDRESS _____
(Street) (City) (State) (Zip Code)

If an address outside the United States is given, please indicate whether you are a United States citizen

Yes ☐ No ☐

If you wish to have net long-term capital gains for your account paid over to you rather than reinvested in additional units as described in the Prospectus, please initial here _____
(initials)

(This authorization is subject to acceptance by First National City Bank at its Headquarters at 399 Park Avenue, New York, New York.)

CUSTOMER'S COPY

AUTHORIZATION FOR COMMINGLING OF AGENCY ACCOUNTS

To: FIRST NATIONAL CITY BANK
P. O. Box 3130, Grand Central Station
New York, N. Y. 10017

In order to obtain your investment management services, I hereby constitute you my attorney and managing agent with discretion as to the investment of any funds at any time held in my investment advisory account with you. You may invest such funds, together with the funds of other customers who have given you the same authority, through a single collective account (the "Commingled Account") consisting of cash and securities in your custody and described in the current Prospectus for the Commingled Account, a copy of which I have received and by the provisions of which I agree to be bound. Except as otherwise required by the Investment Company Act of 1940 or any rule or regulation of the Securities and Exchange Commission thereunder or by any regulation or ruling of the Comptroller of the Currency of the United States, you may as my attorney and agent make any changes in the management or operation of the Commingled Account.

Your authority to act under this letter shall continue until revoked in writing by me or until my death or adjudicated incompetency. It is understood that you shall not, however, be liable for continuing to act after my death or incompetency if you shall not have received notice thereof. If your authority to act under this letter shall be terminated while my account is invested through the Commingled Account, my participation in the Commingled Account shall be terminated and liquidated in the manner described in the Prospectus of the Commingled Account current at the time of such termination.

_____ (Date)

_____ (Signature)

Please Print:

NAME _____ (First) _____ (Middle) _____ (Last)

Social Security Number or Taxpayer Identification Number

ADDRESS _____ (Street) (City) (State) (Zip Code)

If an address outside the United States is given, please indicate whether you are a United States citizen:

Yes ☐ No ☐

If you wish to have net long-term capital gains for your account paid over to you rather than reinvested in additional units as described in the Prospectus, please initial here _____ (Initials).

(This authorization is subject to acceptance by First National City Bank at its Headquarters at 399 Park Avenue, New York, New York.)

PROSPECTUS / JUNE 14, 1966

COMMINGLED INVESTMENT ACCOUNT of FIRST NATIONAL CITY BANK

399 Park Avenue, New York, New York

No person has been authorized to give any information or to make any representations other than those contained in this Prospectus in connection with the offer contained in this Prospectus and, if given or made, such information or representations must not be relied upon as having been authorized. This Prospectus does not constitute an offer of, or a solicitation of an offer to acquire, units of participation in the Commingled Investment Account in any State to anyone to whom it is unlawful to make such an offer or solicitation in such State.

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INVESTMENT ADVISER AND MANAGER

FIRST NATIONAL CITY BANK
399 Park Avenue, New York, N. Y.

LEGAL COUNSEL

DEBEVOISE, PLIMPTON, LYONS & GATES
320 Park Avenue, New York, N. Y.

AUDITORS

HASKINS & SELLS
2 Broadway, New York, N. Y.

FIA 4401 6-66

[Exhibit 13 to Affidavit of James F. Fitzpatrick Civ. Act. No. 1083-66 United States District Court for the District of Columbia]

COMMINGLED INVESTMENT ACCOUNT
of
FIRST NATIONAL CITY BANK

NOTICE OF ANNUAL MEETING OF PARTICIPANTS

The Annual Meeting of the participants of the Commingled Investment Account of First National City Bank will be held at the offices of First National City Bank at 399 Park Avenue, New York, New York, on Wednesday, November 16, 1966, at 11 A.M., New York time, for the following purposes:

(a) To elect members of the Committee for the Commingled Account to hold office until the next Annual Meeting and until their respective successors shall have been elected and qualified.

(b) To consider and, if deemed advisable, ratify the action taken by the Committee in selecting Haskins & Sells as accountants for the fiscal year ended August 31, 1966 and the fiscal year ending August 31, 1967.

(c) To consider and, if deemed advisable, approve the Management Agreement of the Commingled Account with First National City Bank, dated May 25, 1966.

(d) To transact such other business as may properly come before the meeting or any adjournment or adjournments thereof.

Holders of record of units of participation in the Commingled Account as of the close of business on November 15, 1966 are entitled to vote at the meeting or any adjournment thereof.

By order of the Committee,

ROBERT L. HOGUET, JR.
Chairman

October 14, 1966

PLEASE FILL IN, SIGN, DATE AND RETURN THE ENCLOSED FORM OF PROXY PROMPTLY.

You may nevertheless vote in person if you do attend the meeting.

PROXY STATEMENT

GENERAL

This statement is furnished in connection with the solicitation of proxies by the Committee for the Commingled Investment Account of First National City Bank (the "Commingled Account") for use at the Annual Meeting of its participants, to be held at the offices of First National City Bank, 399 Park Avenue, New York, New York, on Wednesday, November 16, 1966, at 11:00 A.M., New York time.

Any person giving a proxy has power to revoke it at any time prior to its exercise. All properly executed and unrevoked proxies received in time for the meeting will be voted.

The record of participants entitled to vote at the meeting, or any adjournment thereof, will be determined as of the close of business on November 15, 1966. Each participant is entitled to such number of votes, in person or by proxy, as is equal to the number of units of participation (including fractions of units) held by such participant. On October 10, 1966, there were 304,798.518 units of participation outstanding.

ELECTION OF MEMBERS OF THE COMMITTEE

It is the intention of the persons named in the accompanying form of proxy to vote at the Annual Meeting for the election of the nominees named below as members of the Committee for the Commingled Account to serve until the next annual meeting of participants and until their successors are elected and qualified. (A participant may specify that his proxy not be voted in connection with the election of the Committee members by checking the box provided for this purpose on the form of proxy.) If any such nominee shall be unable to serve, an event not now anticipated, the proxies will be voted for such person, if any, as shall be designated by the Committee to replace any such nominee.

Information Concerning Nominees

The following table sets forth the principal occupation of each of the nominees for members of the Committee:

Nominee	*Principal Occupation*
CONRAD F. AHRENS	Vice President of First National City Bank in charge of the Investment Research Department of the Bank's Trust and Investment Division and a member of its Investment Policy Committee
ROBERT L. HOGUET, JR.	Executive Vice President of First National City Bank in charge of the Bank's Trust and Investment Division and Chairman of its Investment Policy Committee

Nominee	Principal Occupation
JOHN D. LOCKTON	Treasurer of the General Electric Company, Chairman of the Trustees of the General Electric Pension Trust and other General Electric trusts, and a Trustee of the Elfun Trusts, a mutual fund for General Electric employees
PAUL SAUREL	Partner of the law firm of Morris & McVeigh
HULBERT W. TUPP	Senior Vice President of First National City Bank in the Bank's Trust and Investment Division and a member of its Investment Policy Committee since January 1965. Member of the Bank's Trust Board since 1963. Financial Vice President of the University of Rochester prior to January 1965, and since that date, Chairman of its Investment Committee.

NOTE: All positions shown have been held for more than five years unless otherwise indicated, except that Messrs. Ahrens and Hoguet have been associated with First National City Bank in responsible positions for more than five years, although not at all times in the positions shown.

Each of the nominees named above is now a member of the Committee for the Commingled Account, having been appointed to such position in September 1965 by First National City Bank upon the organization of the Commingled Account, except that Mr. Lockton was elected to the Committee by its members on April 20, 1966. Mr. Hoguet has acted as Chairman of the Committee since April 20, 1936. None of the members of the Committee beneficially owns any units of participation in the Commingled Account.

Remuneration of Members of the Committee

During the fiscal year ended August 31, 1966, the members of the Committee who were not affiliated with First National City Bank received in the aggregate fees of $5,000, for which the Commingled Account was reimbursed by the Bank pursuant to the provisions of the Management Agreement with the Commingled Account. (Further information about the Management Agreement is set forth below under "Approval of Management Agreement".) It is expected that during the fiscal year ending August 31, 1967, the unaffiliated Committee members will receive in the aggregate fees of $10,000. No compensation has been or will be paid out of the Commingled Account to any of the members of the Committee affiliated with the Bank.

Brokerage Commissions on Portfolio Transactions

In placing orders for the purchase and sale of portfolio securities for the Commingled Account, pursuant to the Management Agreement, the primary objective of First National City Bank is to obtain the most favorable prices and execution of orders available. While

there is no undertaking or agreement to do so, it is the Bank's practice to place a major portion of such brokerage business with brokers and dealers who supply supplemental research and statistical information or market quotations to the Bank as the Commingled Account's investment adviser. This practice is not followed if, as a result, the Commingled Account would not obtain the most favorable prices and execution. There is no intention to place portfolio transactions with any particular brokers or dealers or group thereof.

For the fiscal year ended August 31, 1966, the Commingled Account paid total brokerage commissions of $11,769 on portfolio transactions. All such brokerage was allocated to brokers and dealers primarily on the basis of providing research information to First National City Bank and to a small extent for market quotations. It is not possible to place a dollar value on such information. Moreover, the Bank does not believe that its expenses in furnishing investment management are significantly affected by the receipt of such research and statistical information and market quotations, which merely supplement the Bank's own research activities.

APPOINTMENT OF ACCOUNTANTS

The Committee has unanimously appointed Haskins & Sells, a firm of independent certified public accountants, to act as accountants for the Commingled Account's first fiscal year ended August 31, 1966 and for the fiscal year ending August 31, 1967, subject to the ratification of the participants at the forthcoming Annual Meeting. The enclosed form of proxy provides space for instructions, directing the proxies named therein to vote for or against ratification of that appointment.

APPROVAL OF MANAGEMENT AGREEMENT

The Commingled Account is managed by First National City Bank, 399 Park Avenue, New York, New York, pursuant to a Management Agreement dated May 25, 1966. The Management Agreement provides that the Bank will maintain a continuous investment program for the Commingled Account, not inconsistent with its stated investment policy, will determine what securities are to be purchased or sold for the Commingled Account and will execute transactions for the Commingled Account accordingly. It is further provided that the Bank will furnish all custodian, administrative and clerical services, office space and facilities required for the operation of the Commingled Account, will reimburse the Commingled Account for the compensation and expenses, if any, paid by the Commingled Account to any member of the Committee who is not affiliated with the Bank and will pay all costs and expenses arising in connection with the organization of the Commingled Account, as well as the cost of current reports to participants.

For all of its services under the Agreement, First National City Bank receives as of the last day of each fiscal quarter a fee of ⅛ of 1% (approximately ½ of 1% on an annual basis) of the average of the values of the Commingled Account's net assets taken on each valuation date during such quarter. For the period June 2, 1966 to August 31, 1966, this fee amounted to $1,674.42.

The Management Agreement was unanimously approved by the Committee for the Commingled Account, including the members thereof not affiliated with First National City Bank, at a meeting of the Committee held on April 20, 1966. At the time of such meeting, and at September 15, 1966, the only securities of First National City Bank beneficially owned by any of the Committee members consisted of shares of the Capital Stock of the Bank so owned by Messrs. Ahrens and Hoguet which represented in the aggregate less than 2/1,000th of 1% of the shares outstanding.

The Committee has deemed it advisable to submit the Management Agreement to the participants at this time as the Agreement provides that it shall automatically terminate if it is not approved by participants having more than 50% of the units of participation at the first Annual Meeting of the participants.

If approved by the participants at the forthcoming Annual Meeting, the Management Agreement remains in effect until December 31, 1967, and will continue from year to year thereafter, provided that such continuance is approved at least annually either by the Committee (including a majority of the members of the Committee who are not affiliated with the Bank) or by the vote of participants having more than 50% of the units of participation. The Agreement may, on 60 days' notice, be terminated by the Committee, by the vote of a majority of the units of participation as set forth in the Agreement, or by the Bank and terminates automatically if assigned by the Bank. Amendments of the Management Agreement must be approved by the Comptroller of the Currency and by the vote of participants having more than 50% of the units of participation.

First National City Bank, as well as acting as investment adviser and manager for the Commingled Account, may also be deemed its statutory underwriter. The name, address and principal occupation of each director of First National City Bank (including its three principal executive officers) are as follows:

Name and Address	*Principal Occupation*
William M. Batten 235 Trumbull Road Manhasset, New York	Chairman, J. C. Penney Company, Inc.
John E. Sherwith Briarwood Crossing Cedarhurst, New York	Chairman of the Board, National Distillers and Chemical Corporation

Name and Address	*Principal Occupation*
CHARLES M. BRINCKERHOFF 784 Park Avenue New York, New York	Chairman of the Board, The Anaconda Company
PERCY CHUBB, 2ND Chester, New Jersey	Chairman, Chubb & Son Inc.
FREDRICK M. EATON 791 Park Avenue New York, New York	Member, Shearman & Sterling
R. GWIN FOLLIS 3690 Washington Street San Francisco, California	Chairman of the Board, Standard Oil Company of California
J. PETER GRACE 41 Shelter Rock Road Manhasset, New York	President, W. R. Grace & Co.
JOSEPH A. GRAZIER 435 East 52nd Street New York, New York	Chairman, American Radiator & Standard Sanitary Corporation
MICHAEL L. HAIDER 3 East 84th Street New York, New York	Chairman, Standard Oil Company (New Jersey)
H. MANSFIELD HORNER 105 Bloomfield Avenue Hartford, Connecticut	Chairman, United Aircraft Corporation
AMORY HOUGHTON The Knoll Corning, New York	Honorary Chairman of the Board, Corning Glass Works
GEORGE P. JENKINS 485 Ridgewood Avenue Glen Ridge, New Jersey	Chairman of the Finance Committee, Metropolitan Life Insurance Company
JOHN R. KIMBERLY Kimberly Point Neenah, Wisconsin	President, Kimberly-Clark Corporation
ROGER MILLIKEN 627 Otis Boulevard Spartanburg, South Carolina	President, Deering Milliken, Inc.
GEORGE S. MOORE 579 Frogtown Road New Canaan, Connecticut	President, First National City Bank
CHARLES G. MORTIMER 17 Platt Place White Plains, New York	Chairman of the Executive Committee, General Foods Corporation
ROBERT S. OELMAN 235 Park Road Dayton, Ohio	Chairman, The National Cash Register Company

Name and Address	*Principal Occupation*
RICHARD S. PERKINS 141 East 72nd Street New York, New York	Chairman of the Executive Committee, First National City Bank
CLIFTON W. PHALEN 110 East 37th Street New York, New York	Chairman, New York Telephone Company
JAMES S. ROCKEFELLER Indian Spring Road Greenwich, Connecticut	Chairman, First National City Bank
CHAS. H. SOMMER 942 Tirrill Farms Road St. Louis, Missouri	President, Monsanto Company
WILLIAM C. STOLK 14 Sutton Place South New York, New York	Director, American Can Company
LEO D. WELCH Brookville Road Brookville, New York	Former Chairman of Standard Oil Company (New Jersey) and of Communications Satellite Corporation
ALBERT L. WILLIAMS 16 Essex Place Bronxville, New York	Chairman of the Executive Committee, International Business Machines Corporation
JOSEPH C. WILSON 1550 Clover Street Rochester, New York	Chairman and Chief Executive Officer, Xerox Corporation

First National City Bank furnishes investment advice with respect to the assets of two other registered investment companies, The Equity Annuity Life Insurance Company and the National Variable Annuity Company of Florida Separate Account. On August 15, 1966, the market values of the portfolio securities of these companies were, respectively, $7,918,462 and $40,216. First National City Bank's services for both companies are limited to making investment recommendations to management for their approval and the safekeeping of portfolio securities. The Bank's fee for these services is based on the market value of the portfolio of each company, and at present values is computed at the rate of ⅛ of 1% per annum of such value in the case of The Equity Annuity Life Insurance Company and ½ of 1% per annum of such value in the case of the National Variable Annuity Company of Florida Separate Account.

In addition, First National City Bank manages the investments of Netherlands Antilles Mutual Fund N.V., an investment company organized under the laws of the Netherlands Antilles. As of September 7, 1966, such Fund had net assets of $27,918,983. The Bank receives compensation quarterly at the rate of ⅛ of 1% (½ of 1% on an annual basis) of the average net asset value of such Fund.

OTHER MATTERS

The Committee knows of no business to be brought before the meeting other than as set forth above. If, however, any other matters properly come before the meeting, it is the intention of the persons named in the enclosed form of proxy to vote such proxies on such matters in accordance with their best judgment. The cost of preparation and distribution of this notice of meeting and proxy statement and the proxies will be borne by the Commingled Account. Any additional expense in connection with the solicitation of proxies will be borne by First National City Bank.

The Annual Report of the Commingled Account for the fiscal year ended August 31, 1966, including financial statements, is enclosed herewith.

Participants who cannot attend the meeting in person are urged to sign the enclosed form of proxy and return it at once in the envelope enclosed for that purpose.

By Order of the Committee,

ROBERT L. HOGUET, JR.
Chairman

October 14, 1966

PROXY

COMMINGLED INVESTMENT ACCOUNT OF FIRST NATIONAL CITY BA

Annual Meeting of Participants, November 16, 1966

The undersigned hereby appoints ROBERT L. HOGUET, JR., JOHN D. LOCKTON and HULBERT W. TAPPE, and each of them, the proxies of the undersigned, with power of substitution to each of them, to vote all units of participation in the COMMINGLED INVESTMENT ACCOUNT OF FIRST NATIONAL CITY BANK which the undersigned is entitled to vote, at the Annual Meeting of the Participants of the Commingled Account, to be held at the offices of First National City Bank, 399 Park Avenue, New York, New York, on November 16, 1966, at 11 A.M., New York time, and at any adjournment or adjournments thereof:

(1) FOR ☐ the election of members of the Committee for the Commingled Account; [If the foregoing box is left blank and this box ☐ is checked, this proxy will not be voted in connection with such election.]

(2) FOR ☐ AGAINST ☐ ratification of the selection of Haskins & Sells as accountants for the fiscal year ended August 31, 1966 and the fiscal year ending August 31, 1967;

(3) FOR ☐ AGAINST ☐ approval of the Management Agreement of the Commingled Account with First National City Bank, dated May 23, 1966; and

(4) on any other business which may properly come before the meeting or any adjournment or adjournments thereof.

PLEASE SIGN AND DATE ON THE REVERSE SIDE AND MAIL PROMPTLY IN ENCLOSED ENVELOPE.

THIS PROXY IS SOLICITED BY THE MANAGEMENT and will be voted FOR the proposals in paragraphs (2) and (3) unless the participant specifies otherwise, in which case it will be voted as specified.

It will also be voted FOR the election of members of the Committee unless the participant specifies that it not be voted in connection with such election.

Dated: , 1966

RECEIVED

OCT 17 1966

U.S. SECURITIES & EXCHANGE COMMISSION

.....

Signature(s) of Participant(s)

(Please sign exactly as your name or names appear above. When signing as executor, administrator, trustee or custodian for a minor, please give your full title as such. Joint holders should both sign.)

[Exhibit 14 to Affidavit of James F. Fitzpatrick Civ. Act. No. 1083-66 United States District Court for the District of Columbia]

[Letterhead of First National City Bank]

COMMINGLED INVESTMENT ACCOUNT

As a valued customer of the Bank you might wish to know of a recent addition to the services of our Trust and Investment Division. The newly established Commingled Investment Account extends our Investment Advisory service to individuals who wish to invest $10,000 or more. The Commingled Account is also available to joint tenants, custodians for minors, trustees and corporations.

As stated in the enclosed Prospectus, participations are acquired and withdrawn at net asset value without any charge for admission or withdrawal. The Bank receives an annual management fee of approximately ½ of 1% of the net assets of the Commingled Account.

The policy of the Commingled Account is to invest principally in common stocks and convertible securities which, in the Bank's judgment, offer an opportunity for long-term growth of principal and of income. Purchases and sales of securities will be made on the basis of long-term investment considerations and not for short-term profit.

In view of its investment aims, the Commingled Account is designed for investors who have sufficient cash reserves, life insurance or other resources to meet emergencies, and who do not require high current income or stability of principal and of income.

You should give careful consideration to these factors in deciding whether the Commingled Account provides a suitable investment medium for you. If you have any questions we shall be pleased to have you call the officer who handles your account, or our Investment Advisory Department (559-0491).

An individual may become a participant by completing the tear-out authorization form on page 13 of the Prospectus and forwarding it with his check to First National City Bank, P. O. Box 3130, Grand Central Station, New York, New York 10017. Special forms are available from the Bank for joint accounts, custodians for minors, trustees and corporations.

[Exhibit 15 to Affidavit of James F. Fitzpatrick Civ. Act. No. 1083-66 United States District Court for the District of Columbia]

[Letterhead of Board of Governors of the Federal Reserve System]

November 21, 1962

Mr. Charles H. Schimpff, Chairman
Investment Company Institute,
900 Wilshire Boulevard,
Los Angeles 17, California

Dear Mr. Schimpff:

This is in response to your letter of September 10, 1962, asking that the Board review certain of its interpretations of section 32 of the Banking Act of 1933, which express the view that an individual is prohibited by that section of the law from serving at the same time as an officer, director or employee of a member bank and of an open-end investment company. Your letter refers specifically to the interpretations of the Board published in 1941 Federal Reserve Bulletin 399, and 1951 Federal Reserve Bulletin 645.

The position taken by the Board in these interpretations has been reviewed by the Board on a number of occasions in the past at the request of interested persons. One such review was made in 1954-55 at the request of your predecessor organization. However, in the light of your letter the matter has again been considered by the Board.

Section 32, as you know, prohibits interlocking relationships between any member bank and any organization "primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities". A mutual fund is, of course, engaged more or less continuously in the redemption of the stock issued by it and, consequently, it could not well carry on its activities

if it did not issue its own stock on a virtually continuous basis. The fact that such a company issues only its own shares and is not engaged in other activities of the kind described by the statute is not, of course, a relevant consideration; nor is it relevant that the stock is sold to the public through independent organizations with the result that the company derives no direct profit from such sales.

Your letter compares public utilities with mutual funds in that the former may frequently be obliged to issue their own securities in order to expand their operations. The Board believes, however, that public utility companies cannot fairly be compared in this respect with mutual funds since, in the normal case, a public utility is primarily engaged in producing and selling the utility involved and the issuance of its own stock does not constitute one of its primary functions.

For the reasons indicated, the Board continues to be of the opinion that the ordinary open-end investment company must be regarded as an organization of the kind described in section 32 of the Banking Act of 1933.

Very truly yours,

/s/ Merritt Sherman

Merritt Sherman,
Secretary

[Exhibit 16 to Affidavit of James F. Fitzpatrick Civ. Act. No. 1083-66 United States District Court for the District of Columbia]

Commingled Investment Account of First National City Bank

PURPOSE

To make First National City Bank's investment advisory services available to investors with $10,000 or more.

INVESTMENT POLICY

To invest principally in common stocks and convertible securities offering opportunity for long-term growth of capital and of income.

INVESTMENT PHILOSOPHY

To emphasize the careful selection of securities based on intensive research and analysis of the many factors which determine investment values, with primary emphasis on the following:

- the quality and character of management
- effective research and development capability
- low labor costs
- leadership within an industry
- strong underlying growth trend
- sales and service oriented companies

To reappraise constantly the securities held in the portfolio to be sure they continue to meet the selection criteria.

Committee for the Commingled Investment Account

CONRAD F. AHRENS	Vice President of First National City Bank in charge of the Investment Research Department of the Bank's Trust and Investment Division and a member of the Investment Policy Committee
ROBERT L. HOGUET, JR. (Chairman)	Executive Vice President of First National City Bank in charge of the Bank's Trust and Investment Division and Chairman of its Investment Policy Committee
JOHN D. LOCKTON	Treasurer of the General Electric Company, Chairman of the Trustees of the General Electric Pension Trust and other General Electric trusts, and a Trustee of the Elfun Trusts, a mutual fund for General Electric employees
PAUL SAUREL	Partner of the law firm of Morris & McVeigh
HULBERT W. TRIPP	Senior Vice President of First National City Bank in the Bank's Trust and Investment Division and a member of its Trust Board and Investment Policy Committee; and Chairman of the Investment Committee of University of Rochester

To The Participants:

We are pleased to welcome you as participants in the Commingled Investment Account of First National City Bank.

This First Report covers the period from inception on June 2, 1966 to the fiscal year end August 31, 1966.

The stated policy of the Commingled Account is to invest in securities offering the opportunity for long-term growth of both capital and income. At fiscal year end 91.3% of net assets was invested in the securities of 26 different companies selected for this purpose and 8.5% was invested temporarily in U.S. Treasury bills as a reserve for future purchases. Eleven major industries were represented in the portfolio of securities, with investments in the Airline, Drug and Cosmetic, Office Equipment and Petroleum fields making up 50% of the total.

A policy of investing for long-term growth of necessity entails some degree of short-term risk. During the brief period covered by this report both stock and bond prices were under strong downward pressure. Demand for borrowed money was exceptionally strong both by business and government and, in addition, the Federal Reserve adopted a monetary policy which became increasingly restrictive as the year progressed. This pressure was evident in the Commingled Account's investment performance in the first few months, with net assets equal to $8.69 per unit of participation on August 31st. We remain confident that the carefully selected portfolio of securities has potential for growth on a longer term basis.

Robert L. Hoguet Jr.

ROBERT L. HOGUET, JR.
Chairman, Committee for the Commingled Investment Account

October 14, 1966

Commingled Investment Account of First National City Bank

Investments, August 31, 1966

Shares	COMMON STOCKS	Quoted Market Value	% of Net Assets
	AIRLINES		
1,400	Trans World Airlines, Inc.	$ 90,825.00	3.8
	CHEMICALS		
900	Eastman Kodak Co.	$ 107,212.50	4.5
2,000	Monsanto Co.	115,250.00	4.9
		$ 222,462.50	9.4
	DRUGS & COSMETICS		
1,200	Avon Products, Inc.	$ 96,000.00	4.1
700	Bristol-Myers Co.	65,800.00	2.8
1,100	Merck & Co., Inc.	75,900.00	3.2
		$ 237,700.00	10.1
	ELECTRICAL & ELECTRONICS		
1,400	International Telephone & Telegraph Corp.	$ 92,400.00	3.9
1,600	Zenith Radio Corporation	106,000.00	4.5
		$ 198,400.00	8.4
	FOOD & ALLIED CONSUMER PRODUCTS		
400	Coca-Cola Co.	$ 30,000.00	1.3
	FOREST PRODUCTS—PAPER		
4,000	Boise Cascade Corporation	$ 89,000.00	3.7
	OFFICE EQUIPMENT		
700	International Business Machines Corp.	$ 224,350.00	9.6
1,100	Xerox Corporation	195,250.00	8.1
		$ 419,600.00	17.7
	PETROLEUM		
2,000	Louisiana Land & Exploration Co.	$ 87,750.00	3.7
800	Pennzoil Co.	58,400.00	2.5
800	Standard Oil Company (New Jersey)	51,200.00	2.2
		$ 197,350.00	8.4
	PUBLIC UTILITY—ELECTRIC		
900	Carolina Power & Light Co.	$ 38,250.00	1.6
600	Texas Utilities Co.	28,800.00	1.2
		$ 67,050.00	2.8

Shares	COMMON STOCKS (continued)	Quoted Market Value	% of Net Assets
	PUBLIC UTILITIES—TELEPHONE		
2,300	General Telephone & Electronics Corp.	$ 89,700.00	3.8
3,500	United Utilities Inc.	73,062.50	3.1
		$ 162,762.50	6.9
	PUBLISHING		
600	Harcourt, Brace & World, Inc.	$ 47,400.00	2.0
500	Time Inc.	40,125.00	1.7
		87,525.00	3.7
	Total Common Stocks	$1,802,675.00	76.2
	CONVERTIBLE PREFERRED STOCKS		
	PETROLEUM		
900	Union Oil Co. of California $2.50	$ 60,187.50	2.5
	PUBLISHING		
1,300	McGraw-Hill, Inc. $1.20	$ 65,650.00	2.8
	Total Convertible Preferred Stocks	$ 125,837.50	5.3
Face Value	**CONVERTIBLE DEBENTURES**		
$ 50,000	Continental Telephone Corp. 5¼%, 8/1/86	$ 52,187.50	2.2
$ 90,000	Pan American World Airways, Inc. 4½%, 8/1/86	85,950.00	3.6
$ 61,000	United Air Lines, Inc. 4%, 3/1/90	94,855.00	4.0
	Total Convertible Debentures	$ 232,992.50	9.8
	UNITED STATES GOVERNMENT OBLIGATIONS		
$202,000	U.S. Treasury bills 9/30/66	$ 201,262.96	8.5
	TOTAL INVESTMENTS	$2,362,767.96	99.8
	Cash and other assets, less liabilities	5,312.68	.2
	NET ASSETS	$2,368,080.64	100.0

Statement of Assets and Liabilities, August 31, 1966

ASSETS:		
Cash		$ 297,894.96
Receivable for dividends and interest		7,150.24
Investments at market value (cost $2,668,880.07)		2,362,767.96
Total assets		2,667,813.16
LIABILITIES:		
Payable for securities purchased	$297,118.10	
Accrued liabilities	2,614.42	
Total liabilities		299,732.52
NET ASSETS applicable to 272,315.333 units of participation, equal to $8.69 per unit		$2,368,080.64

Statement of Changes in Net Assets

For the Period from June 2, 1966 (Commencement of Operations) to August 31, 1966

Net Assets, June 2, 1966	$ 220,000.00
Amounts received upon issue of 250,315.333 units	2,448,829.35
Net unrealized depreciation of investments	(306,112.11)
Net investment income	5,363.40
Net Assets, August 31, 1966 (including $5,363.40 undistributed net investment income)	$2,368,080.64

Statement of Income and Expense

For the Period from June 2, 1966 (Commencement of Operations) to August 31, 1966

INCOME:		
Dividends		$ 6,066.11
Interest		1,911.71
		7,977.82
EXPENSE:		
Management fee (Note 3)	$ 1,674.42	
Auditing fee	800.00	
State and local taxes (Note 2)	140.00	2,614.42
Net Investment Income		$ 5,363.40

See accompanying Notes to Financial Statements.

(1) Rulings of the Comptroller of the Currency and of the Securities and Exchange Commission favorable to the Commingled Account are being challenged in the United States courts for the District of Columbia by the Investment Company Institute and the National Association of Securities Dealers, Inc., respectively. A decision adverse to either agency might affect the status of the Commingled Account and require its termination and the distribution of its net assets to participants.

(2) No provision for Federal income tax has been made in the accompanying financial statements because the Commingled Account expects to qualify as a regulated investment company within the meaning of the Internal Revenue Code, distributing to participants substantially all investment income and gains realized on sales of investments.

(3) The management fee is paid to First National City Bank as compensation for managing the investments of the Commingled Account and furnishing all custodian, administrative and clerical services, office space and facilities required for the operation of the Commingled Account. Three members of the Committee supervising the Commingled Account are officers of the Bank.

The accompanying financial statements do not include $5,000 of fees paid to the two members of the Committee who are not affiliated with the Bank, which fees were reimbursed by the Bank. Also the Bank absorbed all organization expenses of the Commingled Account.

(4) Purchases of investment securities other than U.S. Treasury bills aggregated $2,467,617.11. There were no sales of such securities.

Opinion of Independent Certified Public Accountants

To the Committee and Participants of
the Commingled Investment Account of
First National City Bank:

We have examined the statement of assets and liabilities and the schedule of investments of the Commingled Investment Account of First National City Bank as of August 31, 1966, and the related statements of income and expenses and changes in net assets for the period from June 2, 1966 (commencement of operations) to August 31, 1966. We inspected the securities represented to us by the Bank as being held for the Commingled Investment Account as of August 31, 1966, obtained confirmations as to securities purchased but not yet received, and found the securities so inspected and confirmed to be in agreement with the accompanying schedule of investments. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the accompanying financial statements and schedule present fairly the financial position of the Commingled Investment Account of First National City Bank at August 31, 1966 and the results of its operations for the period from June 2, 1966 to August 31, 1966, in conformity with generally accepted accounting principles applied on a consistent basis.

New York, September 9, 1966

Haskins & Sells

[Exhibit 17 to Affidavit of James F. Fitzpatrick Civ. Act. No. 1083-66 United States District Court for the District of Columbia]

To The Participants:

We are pleased to present this Semi-Annual Report of the Commingled Investment Account's progress for the six months ended February 28, 1967.

Net asset value per unit of participation on February 28, 1967 registered a new high of $10.80. This compares favorably with a unit value of $8.69 on our previous reporting date, August 31, 1966, and represents an increase of 24%.

We have invested your funds in ten major industries with emphasis in the office equipment, electrical and electronics, drug and cosmetic, and airline groups. The portion of net assets invested in U. S. Treasury Bills was 16.9% on February 28, 1967. These funds function primarily as a reserve for future security purchases and place the Account in a position to take advantage of buying opportunities.

To satisfy frequent requests from our participants that we compare the performance of the Commingled Investment Account with that of the Dow Jones Industrial Average, the tabulation below reflects the percentage change on February 28, 1967 from June 2, 1966 (commencement of operations) and from August 31, 1966 (end of first fiscal year). While the Dow Jones is a widely recognized index of average market performance, we should point out that the stocks held in the Commingled Investment Account were selected for long term growth of capital and income and are therefore not truly comparable with the thirty stocks comprising the Dow Jones Industrial Average.

	June 2, 1966	*August 31, 1966*	*February 28, 1967*	*% Change February 28, 1967 From June 2, 1966*	*% Change February 28, 1967 From August 31, 1966*
Net Assets Per Unit	$10.00	$8.69	$10.80	+8.0%	+24.3%
Dow Jones Industrial Average	882.73	788.41	839.37	−4.9	+ 6.5

Investing in common stocks and convertible securities for long-term growth of both capital and income is our stated investment policy. With this as our objective, we are continually alert to changing conditions and relative values. The rather sharp contraction in stock prices which began last summer continued into October, after which the general level of common stock prices improved despite the less robust economic climate. During this hectic period we effected a number of changes as opportunities arose. While good results over the near-term are gratifying, we want to re-emphasize that long-term goals determine our selections.

We invite your comments or questions.

Robert L. Hoguet, Jr.
Chairman, Committee for the Commingled Investment Account

April 12, 1967

Commingled Investment Account — First National City Bank

Investments, February 28, 1967

Shares	Common Stocks	Quoted Market Value	% of Net Assets
	AIRLINES		
2,100	Trans World Airlines, Inc.	$ 164,325.00	3.6
	CHEMICALS		
1,100	Eastman Kodak Co.	$ 159,087.50	3.5
	DRUGS, COSMETICS, ETC.		
1,600	Avon Products, Inc.	$ 137,200.00	3.0
3,000	Becton, Dickinson & Co.	153,000.00	3.3
2,000	Bristol-Myers Co.	122,250.00	2.7
500	Lilly (Eli) & Co.	43,625.00	.9
1,100	Merck & Co., Inc.	86,625.00	1.9
		$ 542,700.00	11.8
	ELECTRICAL & ELECTRONICS		
2,000	International Telephone & Telegraph Corp.	$ 172,500.00	3.8
1,000	Texas Instruments, Inc.	107,000.00	2.3
2,400	Zenith Radio Corporation	137,700.00	3.0
		$ 417,200.00	9.1
	FOOD & ALLIED PRODUCTS		
1,000	International Flavors & Fragrances, Inc.	$ 41,250.00	.9
	MACHINE TOOLS		
3,500	Kearney & Trecker Corp.	$ 142,187.50	3.1
	OFFICE EQUIPMENT		
800	International Business Machines Corp.	$ 344,000.00	7.5
1,300	Xerox Corporation	323,700.00	7.1
		$ 667,700.00	14.6
	PETROLEUM		
2,000	Louisiana Land & Exploration Co.	$ 117,250.00	2.6
2,000	Pennzoil Co.	180,250.00	3.9
		$ 297,500.00	6.5
	PUBLIC UTILITIES—TELEPHONE		
2,300	General Telephone & Electronics Corp.	$ 112,700.00	2.5
5,000	United Utilities Inc.	150,000.00	3.3
		$ 262,700.00	5.8

Shares	Common Stocks *(continued)*	Quoted Market Value	% of Net Assets
	PUBLISHING		
1,000	Harcourt, Brace & World, Inc.	$ 97,000.00	2.1
	Total Common Stocks	$2,791,650.00	61.0
	Convertible Preferred Stocks		
	ELECTRICAL & ELECTRONICS		
700	Teledyne Inc. $3.50	$ 89,775.00	2.0
1,500	Litton Industries, Inc. Non-cum. Pref. Ptc.	138,750.00	3.0
		$ 228,525.00	5.0
	PETROLEUM		
2,000	Union Oil Co. of California $2.50	$ 141,000.00	3.1
	PUBLISHING		
1,800	McGraw-Hill, Inc. $1.20	$ 138,375.00	3.0
	Total Convertible Preferred Stocks	$ 507,900.00	11.1
Face Value	**Convertible Debentures**		
$ 50,000	Boeing Company Sub. 5½%, 9/1/91	$ 66,750.00	1.5
$100,000	Continental Telephone Corp. 5¼%, 8/1/86	124,000.00	2.7
$100,000	Pan American World Airways, Inc. 4½%, 8/1/86	105,000.00	2.3
$ 85,000	United Air Lines, Inc. 4%, 3/1/90	191,675.00	4.2
	Total Convertible Debentures	$ 487,425.00	10.7
	United States Government Obligations		
$524,000	U.S. Treasury Bills 3/31/67	$ 518,277.65	11.3
$266,000	U.S. Treasury Bills 9/30/67	258,597.10	5.6
	Total United States Government Obligations	$ 776,874.75	16.9
	Total Investments	$4,563,849.75	99.7
	Cash and Other Assets, less Liabilities	15,794.11	.3
	NET ASSETS	$4,579,643.86	100.0%

Purchases and Sales of Investments (Excluding U.S. Treasury Bills) for the Six Months Ended February 28, 1967

Purchases

Face Value	CONVERTIBLE DEBENTURES
$50,000	Boeing Company Sub. 5½%, 9/1/91
$50,000	Continental Telephone Corp. 5¼%, 8/1/86
$10,000	Pan American World Airways, Inc. 4½%, 8/1/86
$24,000	United Air Lines, Inc. 4%, 3/1/90
Shares	**CONVERTIBLE PREFERRED STOCKS**
1,500	Litton Industries, Inc. Non-cum. Pref. Ptc.
500	McGraw-Hill, Inc. $1.20
700	Teledyne Inc. $3.50
1,100	Union Oil Co. of California $2.50
	COMMON STOCKS
400	Avon Products, Inc.
3,000*	Becton, Dickinson & Co.
1,300*	Bristol-Myers Co.
200	Eastman Kodak Co.
400	Harcourt,Brace & World, Inc.
100	International Business Machines Corp.
1,000	International Flavors & Fragrances, Inc.
600	International Telephone & Telegraph Corp.
3,500	Kearney & Trecker Corp.
500	Lilly (Eli) & Co.
1,200	Pennzoil Co.
1,000	Texas Instruments, Inc.
700	Trans World Airlines, Inc.
1,500	United Utilities Inc.
800	Xerox Corporation
800	Zenith Radio Corporation

Sales

Shares	COMMON STOCKS
4,000	Boise Cascade Corporation
900	Carolina Power & Light Co.
400	Coca Cola Co.
2,000	Monsanto Co.
800	Standard Oil Co. (New Jersey)
600	Texas Utilities Co.
500	Time Inc.
600	Xerox Corporation

** Includes shares received as result of stock split.*

Statement of Assets and Liabilities, February 28, 1967

ASSETS:

Cash		$ 88,665.62
Receivable for securities sold		33,601.42
Receivable for dividends and interest		13,852.26
Investments at market value:		
United States Government Obligations (cost $776,874.75)	$ 776,874.75	
Other (cost $3,327,929.17)	3,786,975.00	4,563,849.75
Total assets		4,699,969.05

LIABILITIES:

Payable for securities purchased	$ 111,426.75	
Accrued liabilities	8,898.44	
Total liabilities		120,325.19

NET ASSETS

applicable to 424,179.051 units of participation, equal to $10.80 per unit.... $4,579,643.86

Statement of Changes in Net Assets

For the Six Months Ended February 28, 1967

Net Assets, August 31, 1966 (including $5,363.40 undistributed net investment income)		$2,368,080.64
Income:		
Net investment income	$ 22,974.43	
Undistributed net investment income included in amounts received or paid upon issue and redemption of units...	5,553.86	
Dividends ($.05 a unit)	(16,340.99)	12,187.30
Units issued and redeemed:		
Amounts received upon issue of 159,806.168 units	$1,526,821.70	
Amounts paid upon redemption of 7,942.450 units	73,577.99	1,453,243.71
Realized loss on sale of investments (Note 3)		(19,025.73)
Increase in unrealized appreciation of investments		765,157.94
Net assets, February 28, 1967 (including $17,550.70 undistributed net investment income)		$4,579,643.86

See accompanying Notes to Financial Statements.

Statement of Income and Expense

For the Six Months Ended February 28, 1967

INCOME:		
Dividends		$23,490.00
Interest		13,611.78
		37,101.78
EXPENSE:		
Management fee (Note 5)	$8,089.15	
Legal and auditing fees	5,000.00	
Proxy statements and reports to Securities and Exchange Commission	698.20	
State and local taxes (Note 2)	340.00	14,127.35
Net Investment Income		$22,974.43

(1) Rulings of the Comptroller of the Currency and of the Securities and Exchange Commission favorable to the Commingled Account are under attack in the United States courts for the District of Columbia by the Investment Company Institute and the National Association of Securities Dealers, Inc., respectively. A decision adverse to either agency might affect the status of the Commingled Account and require its termination and the distribution of its net assets to participants.

(2) No provision for Federal income tax has been made in the accompanying financial statements because the Commingled Account has elected to be taxed as a regulated investment company within the meaning of the Internal Revenue Code, distributing to participants substantially all investment income as quarterly dividends and gains realized on sales of investments as an annual distribution.

(3) Gains and losses on sales of investments are based upon the cost of identified securities. If based on average cost the net loss would have been $48,490.66.

(4) Purchases and sales of investments, other than United States Government securities, amounted to $1,410,329.06 and $530,991.27 respectively, during the period.

(5) The management fee is paid to First National City Bank as compensation for managing the investments of the Commingled Account and furnishing all custodian, administrative and clerical services, office space and facilities required for the operaton of the Commingled Account. Three members of the Committee supervising the Commingled Account are officers of the Bank.

The accompanying financial statements do not include $5,000 of fees paid during the six months ended February 28, 1967 to the two members of the Committee who are not affiliated with the Bank, which fees were reimbursed by the Bank.

To the Committee for and Participants in the Commingled Investment Account of First National City Bank:

We have examined the statement of assets and liabilities and the schedule of investments of the Commingled Investment Account of First National City Bank as of February 28, 1967, the related statements of income and expenses and changes in net assets for the six months then ended, and the supplemental schedule of purchases and sales of investments. We inspected the securities represented to us by the Bank as being held for the Commingled Investment Account as of February 28, 1967, obtained confirmations as to securities purchased but not yet received, and found the securities so inspected and confirmed to be in agreement with the accompanying schedule of investments. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the accompanying financial statements and schedule of investments present fairly the financial position of the Commingled Investment Account of First National City Bank at February 28, 1967 and the results of its operations for the six months then ended, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding period, and the supplemental schedule of purchases and sales of investments, when considered in relation to the basic financial statements, presents fairly the information shown therein.

Haskins & Sells

New York, N. Y.
March 10, 1967

PURPOSE: To make First National City Bank's investment advisory services available to investors with $10,000 or more.

INVESTMENT POLICY: To invest principally in common stocks and convertible securities offering opportunity for long-term growth of capital and of income.

INVESTMENT PHILOSOPHY: To emphasize the careful selection of securities based on intensive research and analysis of the many factors which determine investment values, with primary emphasis on companies which meet as many of the following criteria as possible:

- high quality and character of management
- effective research and development capability
- low labor costs
- leadership within an industry
- strong underlying growth trend
- sales and service oriented companies

To reappraise constantly the securities held in the portfolio to be sure they continue to reflect the investment philosophy set forth above.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed April 4, 1967)

Defendant, William B. Camp, Comptroller of the Currency, by his undersigned attorneys, respectfully cross-moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and opposes plaintiffs' motion for summary judgment on the following grounds:

1. Plaintiffs lack standing to maintain this action.
2. There is no justiciable case or controversy between the plaintiffs and defendant.
3. Assuming, arguendo, that plaintiffs have standing, the Comptroller's regulations permitting, national banks to establish collective investment funds for agency accounts and the Comptroller's ruling in connection with the Bank's proposal are in accordance with law and not in excess of his statutory authority:
   a. Such regulations and ruling authorize fiduciary activities permitted by paragraph (a) of Section 1 of the Act of September 28, 1962, 76 Stat. 668, 12 U.S.C. 92a, and are within the scope of the Comptroller's regulatory powers under paragraph (j) of that action.
   b. Such regulations and ruling do not authorize any violation of Sections 16, 20, 21 or 32 of the Banking Act of 1933, 48 Stat 184, 188, 189, 194, as amended, 12 U.S.C. 24 (para. Seventh), 377, 378, 78 (the Banking Act of 1933, as amended).

In support of this cross-motion and opposition, the Court is respectfully referred to the defendant's affidavit and the

affidavit of Robert L. Hoguet, Jr., annexed hereto and to the memorandum of points and authorities filed herewith.

Respectfully submitted,

Barefoot Sanders
Assistant Attorney General

Harland F. Leathers

Irwin Goldbloom

Stephen N. Truitt

Attorneys, Department of Justice,
Washington, D.C. 28530

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

AFFIDAVIT

(Filed April 4, 1967)

District of Columbia, ss:

William B. Camp being duly sworn, deposes and says under oath that:

1. I am Comptroller of the Currency duly appointed by the President of the United States, and, as Comptroller of the Currency, I have responsibility for the administration of the National Bank Act, Title 12 U.S.C., Section 1, et seq., and for supervision and regulation of the approximately 4,800 national banks now operating pursuant thereto.

2. I make this affidavit on the basis of personal knowledge and the records of this Office.

3. On September 28, 1962, Congress, by the enactment of P.L. 87-722, 76 Stat. 668, transferred from the Board of Governors of the Federal Reserve System to the Comptrol-

ler of the Currency the responsibility and power to regulate the fiduciary activities of national banks.

4. In response to these increased responbilities, the Office of the Comptroller of the Currency (the "Office") immediately strengthened its trust division and created a new position entitled "Deputy Comptroller of the Currency for Trusts."

5. Shortly thereafter the Office requested that all national banks and all state banks operating collective investment funds submit to the Office recommendations as to how the existing fiduciary regulations might be improved. The voluminous response convinced the Office that some changes in the regulations were required. To this end, the Comptroller appointed a committee of prominent trust men and directed them to make a thorough study of the fiduciary regulations, with a view toward their revision.

6. As a result of these studies, the Comptroller decided that certain provisions of the existing regulations were in need of revision. Specific amendments, which affected all areas of national bank trust department activity, and which the Comptroller deemed consistent with the letter and spirit of the banking laws, were drafted.

7. Among other things, it was determined that the regulations governing collective investment of funds held by a bank in a fiduciary capacity were unduly and unnecessarily restrictive. The existing regulations authorized a national bank to collectively invest funds held in its capacity of trustee, executor, administrator, or guardian and funds which formed part of a tax exempt pension, profit sharing or stock bonus plan of an employer for the exclusive benefit of his employees. Under these regulations a national bank was not authorized to collectively invest funds held in the capacity of managing agent.

8. Under a discretionary managing agency agreement a customer turns funds or securities over to the bank and the bank undertakes to hold and manage a portfolio of investments for the customer pursuant to a power of attorney

which gives the bank complete investment discretion. For this service, which includes holding the securities, collecting and disbursing dividends or interest, making purchases and sales, and securities analysis, the bank charges a fee.

9. The Federal Reserve Board and the Comptroller of the Currency have consistently taken the position that a national bank cannot enter into such a managing agency agreement unless the bank has applied for and received fiduciary powers. This position is dictated by the fact that a bank holding a managing agency account has a fiduciary relationship with the beneficiary of the account, which relationship is in substance very similar to that of a trustee and beneficiary.

10. The Comptroller determined, after consultation with his counsel and counsel for the committee, that insofar as collective investment was concerned, there was no legal reason whatsoever for distinguishing between funds held by a bank as trustee, executor, administrator or guardian, and funds held under a managing agency agreement.

11. Records of this Office indicate that national banks have managed customers' money under managing agency agreements since at least 1930. However, due to the regulations which did not permit the collective investment of funds so held, each account had to be invested separately. The time and expense incurred in investing each account separately was such that banks could not profitably offer this service to any except those with substantial amounts of money to invest, often $100,000 or more. The management of smaller amounts resulted either in a fee that was unduly high relative to the amount invested, or in losses to the bank. Furthermore, smaller amounts were not able to achieve the diversification of assets which a sound investment program requires. Thus national banks were effectively foreclosed from making their investment facilities and expertise available to any but the wealthy.

12. On the other hand, national banks were operating such collective investment funds as were authorized by the

existing regulations had discovered that relatively smaller trusts or estates could be invested and administered at reduced cost. This, of course, resulted from the economies inherent in managing one large collective investment fund rather than numerous individual small ones.

13. The manner in which banks operate these investment funds is substantially as follows: In its capacity of trustee, executor, administrator or guardian, or as trustee or agent for a pension, profit sharing or stock bonus plan, the bank receives certain funds. If not inconsistent with the trust instrument (the term "trust" is used to include any of the above-listed fiduciary capacities) or State law, the trust funds are used to purchase participations in an existing pool of assets (collective investment fund) held for the benefit of similar trusts. The individual trust's interest in the pool is measured by units of participation. When a collective investment fund is formed, each of these units of participation is given an arbitrary dollar value, but thereafter the value of these units fluctuates as the value of the pooled assets fluctuate. Thus the number of units which a given amount of money will buy depends on the value of the assets in the fund in relation to the number of units of participation outstanding. After the units are valued and the individual participating trust acquires as many as its funds entitled it to, the units of participation, which are evidenced by book entries, become the rest of the individual participating trust.

14. In view of the foregoing the Comptroller, with the concurrence of the General Counsel of the Treasury Department, published in the Federal Register for February 5, 1963, a proposed revision of the fiduciary regulations (12 C.F.R., Section 9). In addition to the types of collective investment funds permitted under prior regulations, this proposed revision provided in Section 9.18(c)(3) that national banks were authorized to invest funds held in the capacity of managing agent in a collective investment fund. Also, Section 9.18 (c)(5) of the proposed revision provided that national banks holding funds in a fiduciary capacity could, with the

approval of the Comptroller, collectively invest such funds in manners other than those expressly provided by Regulation 9.

15. After publication the Office received various comments and criticisms from banks and others. The Investment Company Institute (ICI) submitted a statement which challenged the legality of so much of the proposed regulation as authorized national banks to collectively invest funds held in the capacity of managing agent. ICI argued that the revised regulations would permit activity prohibited by 12 U.S.C. Section 92a, and certain provisions of the Glass-Steagall Act, as amended, 12 U.S.C. Sections 24, 78, 277 and 278.

16. The Comptroller considered the arguments presented and determined, with advice of counsel, that they were without merit. The revised regualtions (with minor modifications) became effective on April 5, 1963.

17. Since the Securities and Exchange Commission took the view that a collective investment fund for managing agency accounts as expressly authorized by Section 9.18 (c) (3) of Regulation 9 would have to be registered under the Investment Company Act of 1940, and the interests therein registered under the Securities Act of 1933, there was no immediate attempt by any bank to establish such a fund. Then, early in 1965, the First National City Bank of New York, after consultation with the staff of the S.E.C., drafted a plan for the collective investment of managing agency accounts, which the Bank referred to as a Commingled Investment Account. The plan complied with each of the provisions of Section 9.18(b) of Regulation 9, generally relating to collective investment funds, except that a few modifications were effected to facilitate compliance with the Investment Company Act of 1940. Because this plan, which in the opinion of the Bank's counsel was permitted under New York law, differed from the specifically enumerated collective investment funds authorized by the Comptoller's revised Regulation, the Bank, pursuant to 12 C.F.R.

9.18(c)(5), sought and obtained the Comptroller's express written approval of the plan. A copy of the approval as set forth in the letter of May 10, 1965, is attached hereto as Exhibit "A". This plan was also approved by the Board of Governors of the Federal Reserve System as not involving a violation of Section 32 of the Banking Act of 1933, 12 U.S.C. 78. The Commingled Investment Account was registered under the Investment Company Act.

18. A national bank's operation of a fund for the collective investment of money held in the capacity of managing agent does not differ materially from the operation of a fund for the collective investment of money held in the capacity of trustee. In the latter case the fiduciary capacity in which the bank receives and holds the money is designated "trustee," in the former, it is designated "managing agent." In both cases the fiduciary relationship between the bank and the individual customer continues while the funds are collectively invested. Given this continuing fiduciary relationship, both types of collective fund are considered by this Office to be fully consistent with the letter and spirit of the national banking laws.

19. In the considered opinion of the Office of the Comptroller of the Currency, the collective investment of funds held by national banks in the capacity of managing agent will be beneficial to the banks and to the public by enabling banks to make available their investment and managerial expertise to a class of persons who have heretofore not been able to afford it.

/s/ William B. Camp
Comptroller of the Currency
of the United States

[Jurat omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

**AFFIDAVIT OF ROBERT L. HOGUET, JR.
IN SUPPORT OF DEFENDANT'S CROSS-MOTION
FOR SUMMARY JUDGMENT**

(Filed April 4, 1967)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ROBERT L. HOGUET, JR., being first duly sworn, deposes and says as follows:

1. I am an Executive Vice President of First National City Bank (the "Bank") and am in charge of the Bank's Trust and Investment Division. I am also Chairman of the Committee for the Bank's Commingled Investment Account (the "Commingled Account"). I submit this affidavit in support of defendant's cross-motion for summary judgment in this action.

2. The Bank is a national banking association having its principal place of business in the City, County and State of New York. Through its Trust and Investment Division, the Bank provides its customers with a full range of fiduciary services. A copy of the Bank's permit to exercise fiduciary powers, issued by the Federal Reserve Board to the Bank's predecessor on January 29, 1919, is attached hereto as Exhibit A. Pursuant to this permit the Bank has the right to act, when not in contravention of state or local law, as trustee, executor, etc., "or in any other fiduciary capacity in which State banks, trust companies or other corporations which come into competition with national banks, are permitted to act under the laws of the State of New York."

3. Whenever the Bank acts as trustee, its principal function is the investment management of the trust assets. The Bank, of course, performs other important duties, such as the safe-keeping of the trust assets and the disbursement of

income and principal in accordance with the terms of the governing instrument. But the trust business is primarily the business of providing continuous, professional management of investments. To render this service, the Bank's Trust and Investment Division maintains an Investment Research Department which is constantly studying and evaluating the investment potential of various industries and companies. The Trust and Investment Division also has available to it the views of the Bank's Economics Department as to current economic conditions and long-range trends. Each of these Departments is staffed with full-time, highly qualified personnel who have on hand information which no individual trustee or investor could hope to assemble. The trust officers responsible for the supervision of the Bank's trust accounts utilize the investment and economic analyses of these Departments in making investment decisions for such accounts.

4. As a natural adjunct to the management of trust funds, the Bank has also for many years provided investment advisory services to customers who do not wish to create a trust, but who do want the benefit of the Bank's professional investment management and custodial service. For such customers the Bank acts as agent rather than as trustee. Under one type of agency arrangement the Bank manages the investments in the account pursuant to a power of attorney giving the Bank full investment discretion. This type of account is known in the banking industry as a "managing agency account", and many state-chartered banks and trust companies in New York which are in competition with the Bank have offered this type of investment advisory service for years.

5. Individual investment management of either a trust or agency account entails certain administrative duties which must be performed separately for each account, regardless of size. These duties include holding and handling portfolio securities, making purchases and sales, collecting and disbursing dividends and exercising investment super-

vision—all on an individual basis. Larger accounts generate a fee which is sufficient to cover these administrative costs; but a fee charged at the same rate (i.e., percentage of asset value) to a smaller account is likely to be insufficient, and the fee cannot be increased without becoming excessive in relation to the amount under management. Thus, in the case of managing agency accounts, the Bank's administrative expense for individual supervision has in recent years dictated a minimum charge of $1,000 a year, and the Bank has not generally accepted such accounts unless the customer's investment funds amounted to at least $200,000. There has been, however, a constant demand for the Bank's investment management services from customers with more modest amounts to invest, and the Bank has searched for methods of reducing administrative costs in order to enable it to accept such accounts.

6. With respect to smaller trust accounts, the Bank has for many years been able to minimize administrative costs by commingling the assets of these trusts for investment purposes in a common trust fund. The economies of collective investment are such that the Bank can afford to accept trust accounts that it would otherwise have to refuse if forced to manage such accounts on an individual basis. The Bank operates a number of collective investment funds which have been established pursuant to Regulation 9 of the Comptroller of the Currency (12 CFR 9) or prior regulations of the Federal Reserve Board. Those funds which the Bank has established for the collective investment of assets which it holds in its capacity as personal or testamentary trustee, executor, administrator or guardian are also established and operated in conformity with Section 100-c of the New York Banking Law. Those funds which the Bank has established for the collective investment of assets held as trustee of employee-benefit pension or profit-sharing trusts are not established and operated pursuant to Section 100-c of the New York Banking Law. The Bank has been advised by counsel that, since the governing instrument of each trust participating in the collective

investment funds for employee-benefit trusts specifically authorizes the commingling of trust assets, such collective funds can be maintained as "contract" funds and that there is no need to look to Section 100-c for authority to commingle. On information and belief, state-chartered banks in New York also maintain similar collective funds for the investment of assets of employee-benefit trusts which are established and operated as "contract" funds and not pursuant to Section 100-c of the New York Banking Law.

7. In 1963 the Comptroller of the Currency revised Regulation 9 to permit the same technique of collective investment to be used with respect to managing agency accounts. This revision cleared the way for the Bank to develop its proposal for the Commingled Account. The Commingled Account is designed for those customers who wish to obtain the Bank's investment management services but who do not have sufficient capital to justify the expense of an individually supervised account. The Commingled Account is operated in accordance with a plan that has been filed with the Comptroller of the Currency and which also serves as a Securities Act prospectus. The Commingled Account works this way: The customer turns his funds ($10,000 or more) over to the Bank pursuant to a broad authorization making the Bank the customer's managing agent. There is thus created at the outset a true fiduciary relationship of principal and agent between each customer and the Bank. The authorization includes specific authority for the Bank to invest the customer's funds, together with the funds of other customers who have given the same authorization, through the Commingled Account. If the Bank is satisfied that the investment policy of the Commingled Account is suitable to the customer's needs, the Bank accepts the customer's account and, as his agent, adds his funds to the Commingled Account on one of the specified valuation dates.

8. Each customer who participates in the Commingled Account shares in proportion to the amount of his funds which are included. For convenience in determining the

proportionate interest of each particpating customer (or "participant"), the Commingled Account is divided into units of equal value. A participation is transferable only to another person who has validly appointed the Bank as managing agent, and, because of the underlying agency relationship the interest of a participant terminates upon his death or incompetency and his funds are withdrawn from the Commingled Account and held for his legal representatives.

9. There is no charge either for admission to or withdrawal from the Commingled Account. Each dollar received by the Bank for investment through the Commingled Account participates in full. No broker or dealer is engaged to underwrite or distribute participations, and no sales commission is paid to anyone in connection with the admission of a participant to the Commingled Account.

10. The operation of the Commingled Account is supervised by a Committee initially appointed by the Bank but thereafter elected annually by the participants. (The first election was held on November 16, 1966.) At least 40% of the members of the Committee must at all times be persons not affiliated with the Bank, but the majority of the members may be, and are expected to be, officers in the Bank's Trust and Investment Division. At the present time, three of the five Committee members are Bank officers.

11. The Bank manages the Commingled Account pursuant to a management agreement. The Bank maintains a continuous investment program consistent with the Commingled Account's stated investment policy, and the Bank also furnishes all custodial, administrative and clerical services required for the operation of the Commingled Account. For all of these services the Bank is entitled to withdraw from the Commingled Account a management fee equal, on an annual basis, to ½ of 1% of the average net asset value of the Commingled Account. In other words, a customer who invests $10,000 through the Commingled Account pays $50 for a year's management, which is equivalent to the

$1,000 which is charged for a year's management of a $200,000 individual account. Whether a customer invests through the Commingled Account or has an individually supervised account, the management fee is the only fee which the Bank receives; there is no underwriting or distributing profit involved in the operation of the Commingled Account.

12. The arrangement for the Commingled Account has been considered and passed upon by the three Federal bank supervisory agencies and the Securities and Exchange Commission. The Comptroller of the Currency has approved the Commingled Account as a permissible form of collective investment subject to the requirements of Section 9.18 of Regulation 9, 12 C.F.R. § 9.18 (Supp. 1966). See *Hearings on S. 2704 Before a Subcommittee of the Senate Committee on Banking and Currency*, 89th Cong., 2d Sess. 418 (1966) [hereinafter referred to as the "*Hearings*"]. The Board of Governors of the Federal Reserve System has ruled that service by Bank officers on the Committee for the Commingled Account will not violate Section 32 of the Banking Act of 1933, 48 Stat. 194, as amended, 49 Stat. 709 (1935), 12 U.S.C. § 78. See *Hearings* 580. The Federal Deposit Insurance Corporation has stated that it believes that it is "sound public policy to permit banks collectively to invest funds held in the capacity of managing agent for their customers." See *Hearings* 25. And the Securities and Exchange Commission has found that the Commingled Account can be operated in conformity with all of the purposes and policies of the Federal security laws. See *Hearings*, 138.

13. In my view, the Commingled Account has in its short existence proven itself as a valid extension of traditional bank fiduciary services. First National City Bank already exercises investment responsibility or gives investment advice in respect of accounts having aggregate assets of more than $8.5 billion. The Bank has had extensive experience in the operation of common trust funds. It is

an institution of proven financial stability and has a long history of investment experience. It is seeking to make this experience available for the first time to the smaller investor at a low relative cost and without the imposition of any sales commission or "load". The Bank officers who are consulted by customers in connection with participation in the Commingled Account have no sales commission to earn by "selling" a customer on the advantages of the Commingled Account. Such officers are instructed that only persons for whom the Commingled Account constitutes a suitable investment medium should be permitted to participate. The Bank's operation of the Commingled Account is subject to successive layers of regulation imposed by banking authorities, the common law applicable to fiduciaries and the laws administered by the Securities and Exchange Commission. If a service of this nature is in fact competitive with mutual funds, as plaintiffs claim, the competition is entirely lawful and can only redound to the benefit of the public in terms of lower sales commissions on mutual fund shares.

/s/ Robert L. Hoguet, Jr.

[Jurat omitted in printing]

EXHIBIT A

FEDERAL RESERVE BOARD

Washington, D.C.
January 29, 1919.

Pursuant to authority vested in the Federal Reserve Board by the Act of Congress approved December 23, 1913, known as the Federal Reserve Act, as amended by the Act of September 26, 1918, the National City Bank of New York, New York has been granted the right to act, when not in contravention of State or local law, as Trustee, Executor, Administrator, Registrar of stocks and bonds, Guardian of estates, Assignee, Receiver, Committee of estates of lunatics,

or in any other fiduciary capacity in which State banks, trust companies or other corporations which come into competition with national banks, are permitted to act under the laws of the State of New York. The exercise of such rights, shall be subject to regulations prescribed by the Federal Reserve Board.

FEDERAL RESERVE BOARD

By /s/ D. Rawlings
Governor

Attest:

/s/ J. A. Broderick
Secretary

[Exhibit continued]

May 10, 1965

Mr. Robert L. Hoguet, Jr.
Executive Vice President
First National City Bank
399 Park Avenue
New York, New York

Dear Mr. Hoguet:

This is in reply to your request of April 26 for our approval of an arrangement to be entered into by the bank whereby funds of agency accounts which confer investment discretion on the bank are to be invested and reinvested in a single commingled account.

More specifically, the principal features of the arrangement are as follows:

> The funds of certain agency accounts of at least $10,000 in amount will be commingled for investment purposes. Funds deposited with the bank for this purpose will be accompanied by a broad authorization to the bank, substantially equivalent to the

power of attorney under which customers currently deposit their funds for individual attention.

The availability of the commingled account will not be given publicity by the bank except in connection with the promotion of its fiduciary services in general and the bank will not advertise or publicize the commingled account as such. Participations in the commingled account are to be made available only on the premises of the bank and its branches, or to persons who are already customers of the bank in other connections, or in response to unsolicited requests.

The Plan of the commingled account and the letter of authorization signed by the customer will be delivered to each customer of the bank who empowers the bank to invest his funds in the commingled account.

The commingled account will operate as follows. The supervision of the commingled account will be in the hands of a committee, the members of which will initially be appointed by the bank but thereafter elected by the participants at annual meetings. It is expected that officers of the bank will be members of the committee, except that at all times there will be at least one member who is independent of the bank. Pursuant to a management agreement with the committee, the bank will be responsibile for the management of the investments in the commingled account, will have custody of the assets in the commingled account, will handle all transactions in the portfolio of the commingled account, and will maintain the records and keep the books of the commingled account.

The management agreement shall be subject to the approval of the particpants at their first annual meeting. The management agreement will remain in force for two years from the date of its execution and is renewable annually thereafter, provided that such continuance is approved annually by the committee, including a majority of the members of the committee who are not directors, officers, or

employees of the bank, or by vote of participants having a majority of units of participation. No compensation is to be paid out of the commingled account to any of the members of the committee who are affiliated with the bank. Compensation and expenses, if any, may be paid to the members of the committee who are not affiliated with the bank, but the commingled acount will be reimbursed by the bank. The agreement provides that the bank will maintain a continuous investment program for the commingled account not inconsistent with its stated investment policy. The bank will determine what securities are to be purchased or sold for the commingled account and will execute transactions for the commingled account accordingly. The agreement further provides that the bank will furnish all custodian, administrative and clerical services, office space, and facilities required for the operation of the commingled account.

The interest of each customer participating in the commingled account is to be reflected in one or more units of participation and all such units shall have equal value. As evidence of the number of units of participation credited to a customer, a receipt will be given for his funds so deposited. Except for periods during which the calculation of net asset value may be suspended as permitted by the rules and regulations of the Securities and Exchange Commission and as detailed in the Plan, a customer will at any time be able to terminate his participation and cause a calculation of net asset value to be made for purposes of determining the value of the units of participation which are to be terminated and the amount to be withdrawn from the commingled account. In order to protect the rights of participants in the event of a suspension of the payment of terminating distributions, it is provided that if at the time of any such suspension a participant shall have given a notice of termination but shall not yet have received a distribution, such participant shall have the right to withdraw the notice of termination. Termination will occur auto-

matically upon the death of or adjudicated incompetency of the participant. Receipts for units of participation will not as such be transferable by a customer but a participant will be able to transfer his interest in the commingled account only to persons who have the legal capacity to appoint the bank as agent and who sign the broad authorization to the bank to have such funds so invested.

The commingled account will be audited at least semiannually by independent public accountants selected by the committee and approved by the participants. The financial reports based upon such audits, containing financial statements and other information as required by applicable laws and regulations, shall be filed with the appropriate regulatory authorities and shall be addressed to the committee and to the participants.

For the bank's services, the commingled account will be charged as of the last day of each fiscal quarter a fee payable to the bank based on a percentage of the average of the values of the net assets of the commingled account taken on each valuation date during such quarter for the purposes of determining the asset value of units of participation in the commingled account. The quarterly fee which the bank will receive from the commingled account pursuant to the management agreement will be the only fee charged by the bank in connection with the operation of the commingled account and shall not exceed the fee charged for investment advisory service for individual accounts of less than $500,000 if assets of the participant had not been invested in participations in the fund. Further, the bank will absorb all costs arising in connection with the organization of the commingled account, which shall include, among other things, costs and expenses attributable to the initial registration and qualification of the commingled account under the federal securities laws; the initial determination of its tax status and any rulings obtained for this purpose; its qualification under the laws of any State; and its approval by the Comptroller of the Currency. The expenses

that are charged to the commingled account are brokers' commissions; cost of independent professional services such as legal, auditing or accounting services (other than in connection with the organization of the commingled account), taxes or governmental fees attributable to transactions for the commingled account, or to income from the commingled account assets; costs of maintaining the registration and qualification of the commingled account under the federal securities laws or other applicable regulatory requirements (other than the cost of printing, publication and distribution of current reports to participants, which will be borne by the bank); and the cost of preparation and distribution of reports to participants and proxy statements.

The preceding arrangement is a form of collective investment subject to the requirements of Section 9.18 of Regulation 9. As contemplated, the commingled account does not comply with certain provisions of Section 9.18(b) of the Regulation. However, it appears to us that the arrangment would be a desirable one for the bank and the participating accounts and would embody all of the protections deemed necessary by this Office. Accordingly, pursuant to the provisions of Section 9.18(c)(5) of Regulation 9, the arrangement, and any minor changes within the Plan, letter of authorization and receipt which may be made and which do not detract from the substance of the proposal, is hereby approved so long as the rules and regulations of the Comptroller of the Currency applicable to collective investment, specifically the provisions of Section 9.18(b), except as provided for in the foregoing arrangement, are complied with during the life of the arrangement. In addition, the management contract has the approval of this Office; however, any changes which are made in the contract must be approved by the Comptroller.

Sincerely,

/s/ James J. Saxon
Comptroller of the
Currency

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INVESTMENT COMPANY INSTITUTE, et al.,
Plaintiffs

v.

WILLIAM B. CAMP, Comptroller of the Currency,
Defendant

Civil Action
No. 1083-66

OPINION

G. Duane Vieth, Esq., James F. Fitzpatrick, Esq., Charles R. Halpern, Esq., Arnold & Porter, Esqs., and Robert L. Augenblick, Esq. for plaintiffs.

Barefoot Sanders, Assistant Attorney General, Harland F. Leathers, Esq., Irwin Goldbloom, Esq., and Stephen M. Truitt, Esq., Department of Justice, David G. Bress, United States Attorney, and Joseph M. Hannon, Esq., Assistant United States Attorney, for defendant.

This action is brought against the Comptroller of the Currency by the Investment Company Institute in its representative capacity of the open-end investment companies, investment advisers and principal underwriters which comprise its membership. The Investment Company Institute (hereinafter called the Institute) is an unincorporated association, having its principal place of business in the city, county and state of New York. The Institute is a national association, having as its members 177 open-end management investment companies and their 88 investment advisers and 78 principal underwriters. The open-end management investment companies which are members of the Institute have assets of $36 billion, representing about 94 percent of the assets of all such companies in the United States, and have approximately 3.5 million shareholders. The other plaintiffs in this action are several individual members of the Institute. They seek an injunction to restrain the Comp-

troller from authorizing national banks to collectively invest funds tendered to the bank as managing agent solely for investment purposes. They also pray for a declaratory judgment adjudicating the pertinent regulation promulgated by the Comptroller to be invalid.

The action is now before this court on cross motions for summary judgment, all of the parties agreeing that no factual issues exist and that the legal issues are ripe for disposition by summary proceedings.

It is first necessary to review and to delineate the factual background upon which the issues in this action arose and within which these motions are made. In September of 1962 the statutory authority to regulate the fiduciary activities of national banks was transferred from the Board of Governors of the Federal Reserve System to the Comptroller of the Currency. Pub.L. 87–722, 76 Stat. 668, 12 U.S.C. § 92a. Pursuant to this authority, the Comptroller caused to be published in the Federal Register for February 5, 1963, a proposed revision of the fiduciary regulation, 12 C.F.R. § 9. In addition to the types of collective investment funds permitted under the prior regulation, this proposed revision provided that national banks were authorized to invest funds held in the capacity of managing agent in a collective investment account, 12 C.F.R. § 9.18(a)(3).[1] Moreover, the proposed revised regulation allowed the Comptroller to approve collective investment of such funds in manners other than those expressly provided by Regulation 9, 12 C.F.R. § 9.18(c)(5).[2]

The Comptroller invited national banks and other interested parties to submit comments pertaining to the proposed

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[1](3) In a common trust fund, maintained by the bank exclusively for the collective investment and reinvestment of monies contributed thereto by the bank in its capacity as managing agent under a managing agency agreement expressly providing that such monies are received by the bank in trust.

[2](5) In such other manner as shall be approved in writing by the Comptroller of the Currency.

regulation. Plaintiff Institute, on behalf of its members, participated to the full degree permitted and submitted a statement in opposition to the proposed regulation. It premised its argument on the same basis that it is presenting before this court, namely, that the revised regulation would allegedly permit activity prohibited by 12 U.S.C. § 92a, and certain provisions of the Glass-Steagall Act, as amended, 12 U.S.C. §§ 24, 78, 377 and 378. Notwithstanding this opposition the final regulation was adopted by the Comptroller on April 5, 1963, and revised by minor modifications on February 5, 1964, 12 C.F.R. § 918.

Pursuant to the regulation, on May 10, 1965, the Comptroller approved a plan submitted by First National City Bank of New York (hereinafter referred to as the Bank) for the establishment and operation of a collective investment fund, called the Commingled Investment Account, under Regulation 9, 12 C.F.R. § 9. The plan as outlined by the Bank differed from the specifically enumerated collective investment funds authorized by the Comptroller's revised Regulation, but the Bank, pursuant to 12 C.F.R. § 9.18(c)(5) sought and obtained the Comptroller's written approval of the plan.

On April 20, 1966, the Bank registered its Commingled Investment Account with the Securities and Exchange Commission pursuant to the Investment Company Act of 1940, 15 U.S.C. § 80a–1 et seq. as an open-end management investment company. On the same date, the Bank filed a registration statement with the Securities and Exchange Commission pursuant to the Securities Act of 1933, 15 U.S.C. § 77a et seq., for the purpose of registering the participating interests or units to be issued by its Commingled Investment Account. The registration statement concerning those participating interests or units became effective on June 14, 1966. From that date the Bank has offered and sold to the public participating interests or units issued by the Commingled Investment Account by means of the prospectus for the First National City's Commingled Investment Account.

Before proceeding to the merits of this controversy, it is best at this time to specifically describe the operation of a mutual fund and the operation of the Commingled Investment Account (hereinafter referred to as the Account) so that a better understanding of the problem can be achieved.

Generally, "mutual funds" are open-end management companies engaged in the business of continuously issuing and offering for sale redeemable securities which represent an undivided interest in the fund's assets. Most mutual funds are corporate in form and the securities issued by them usually consist of capital stock. However, there are a number of mutual funds in a variety of noncorporate forms and the securities issued by some of them are variously denominated as beneficial interests, participating agreements, and the like. The proceeds from the sale of the securities issued by a mutual fund are invested in a portfolio of securities of various kinds, in accordance with the stated investment policy of the particular fund. Some funds invest primarily in securities offering current income; others concentrate on long-term growth securities; still others specialize in particular industries or classes of securities; and many offer various combinations of objectives. The shareholder in a mutual fund is entitled at any time to redeem his interest, usually at net asset value, or in a few instances upon payment of a charge. To facilitate this redemption privilege as well as to establish a price at which new shares are being offered, the value of a share in a mutual fund is calculated regularly, typically twice daily, on the basis of the market value of the securities held by the fund. Because of the continuous process of redemption, the mutual fund would be restricted and contracted in size, unless it continuously issued and offered new securities for sale.

Except in unique circumstances, virtually no shares in mutual funds are traded from one investor to another, and there is no significant trading market for such shares. In almost all cases, shareholders in mutual funds desiring to obtain cash for their shares redeem them with the issuing company. The securities issued by most mutual funds are

offered to the public at a price which includes a sales commission or sales load. There are some mutual funds whose shares are sold with no sales commission being charged. These latter funds are frequently called "no load" mutual funds. The activities of mutual funds are under the control of a board of directors or board of trustees. Directors or trustees are elected annually by the vote of a majority of the fund's outstanding voting securities.

Mutual funds usually contract an outside investment adviser for investment advice and other management services, and with a principal underwriter for the distribution of the fund's shares, pursuant to the statutory pattern established by the Investment Company Act of 1940, 15 U.S.C. § 80a–15. The investment adviser of a mutual fund furnishes advice to the fund with respect to its investment portfolio and the securities it should buy, hold, and sell. In some cases the adviser is empowered to purchase and sell securities for the fund. Some investment advisers also furnish supervisory and administrative services to the mutual fund. The investment adviser receives compensation for its services, usually in the form of a fee based on the total value of the assets being managed.

The principal underwriter of a mutual fund is engaged in the business of selling and distributing the securities issued by the fund to the investing public through brokers or dealers, or directly through the underwriter's own salesmen, or both. The principal underwriter either purchases the securities issued by the fund for resale or acts as agent for the fund in distributing the securities. Except in the case of a no-load fund, the principal underwriter receives a fee for its services, usually in the form of a portion of the sales commission included in the selling price of the shares issued by the mutual fund.

Mutual funds are required to be registered with the Securities and Exchange Commission pursuant to the Investment Company Act of 1940. The activities of the mutual funds and their relationship with affiliated persons and

others are all subject to regulation under the Act. The investment advisers and principal underwriters who are plaintiffs herein, perform their services for the mutual funds they serve pursuant to contracts, the terms, execution and continuation of which are subject to the provisions of Section 15 of the Investment Company Act of 1940, 15 U.S.C. § 80a–15. The securities issued by each of the mutual fund members of the Institute are registered with the Securities and Exchange Commission pursuant to the Securities Act of 1933, 15 U.S.C. § 77a et seq. All such securities are offered to the investing public by means of a prospectus which is initially filed with the Securities and Exchange Commission under the Securities Act of 1933 as part of the registration statement for the securities to which the prospectus relates.

As can be readily ascertained, the mutual fund community is composed of three principal members. First the body corporate of the fund itself whose membership is the general investing public. This relationship is analogous to the common productive corporate structure. However, the primary function of the investment corporation is to obtain the objectives which are outlined in their charter through the mutual investment of the funds contributed by the "shareholders". Aldred Inv. Inst. v. S. E. C., 151 F.2d 254 (1st Cir. 1945) cert. denied 326 U.S. 795, 66 S.Ct. 486, 90 L.Ed. 483 (1945). The relationship between the shareholder and the body corporate is plainly one of contract. Stevenot v. Norberg, 210 F.2d 615 (9th Cir. 1954); see also Schroeter v. Bartlett Syndicate Bldg. Corp., 8 Cal.2d 12, 63 P.2d 824, 825; Ellingwood v. Wolf's Head Oil Refining Co., 27 Del. Ch. 356, 38 A.2d 743, 154 A.L.R. 406 (1944); Corporations, 18 Am. Jur.2d § 463 (1965).

The management function of the mutual fund lies with the board of directors. They have essentially the equivalent powers as any corporate board of directors. In the same manner they are also responsible to their shareholders as fiduciaries. Pepper v. Litton, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281 (1939); Brown v. Bullock, 194 F.Supp. 207 (S.D. N.Y. 1961), affirmed 294 F.2d 415 (2nd Cir. 1961).

The board of directors within its broad scope of authority has the power to enter into contracts with the other two members of the mutual fund community, that is the investment advisers and the underwriters. The functions performed by the latter two members of the mutual fund community is essential for the propagation of the investment or the mutual fund corporation. The interrelationship of these independent entities is one of contract which essentially determines the respective position occupied within the structure by each member. The independence of each member is governed by statute as is their interdependence; see the Investment Company Act of 1940, 15 U.S.C. § 80a–1 et seq.

The above few paragraphs outline the general operation of the mutual fund structure. A similar outline is now presented for the operation of the Account as created by the Bank and approved by the Comptroller pursuant to Regulation 9.

The Account as established by the Bank, operates as follows: the investor-customer tenders his funds, $10,000 or more, to the Bank pursuant to a broad authorization making the Bank the customer's managing agent. There is thus created a principal-agent relationship between each individual investor-customer and the Bank. The authorization includes specific authority for the Bank to invest the customer's funds, together with the funds of other customers who have given the equivalent authorization, through the commingled Account. Funds in the commingled Account are invested in a pool of securities, principally common stocks and securities convertible into common stocks, offering the opportunity for long term growth of capital and income. The Account is divided into "units of participation" of equal value in order to determine conveniently the proportionate interest of each participant. No certificates indicating the "units of participation" are issued by the Bank; however, the participant is informed by a nonnegotiable document as to how many units "of participation" are contained in his account.

A participation is transferable only to another person who has validly appointed the Bank as managing agent, and, because of the underlying agency relationship, the interest of a participant terminates upon his death or incompetency and his funds are withdrawn from the Account and held for his legal representatives. There is no sales charge imposed on amounts invested in the commingled Account nor is there any redemption charge incurred upon withdrawal from the Account. An investor-customer may terminate his participation in whole or in part on the basis of the net asset value of the units of participation being redeemed. The net asset value of each unit of participation is determined as of the close of business of each of a number of specified valuation dates by dividing the net asset value of the Account as of the close of business on the valuation date by the number of units of participation then outstanding.

The operation of the Account is supervised by a Committee of five persons, who act essentially as a board of directors of the Account. Initially the members were appointed by the Bank, but hereafter are to be elected annually by the participants. Each participant will be entitled to vote at the election of the Committee members and his vote will be weighted according to the number of "units of participation" in his account. At least 40% of the members of the Committee must at all times be persons not affiliated with the Bank, but the majority of the members may be, and are expected to be, officers in the Bank's Trust and Investment Division.

The Committee is authorized to enter into a management agreement with the Bank. The agreement and any amendments thereto must be approved by more than 50% of the participants at their annual meeting and the Comptroller's approval thereof must also be obtained.

In accordance with the management agreement, the Bank serves as investment adviser and custodian for the Account. The Bank, therefore, maintains a continuous investment program consistent with the commingled Account's

stated investment policy; it will determine what securities are to be purchased and sold, and will execute all transactions. The management agreement provides that the Bank will furnish all administrative, custodial and clerical services required by the Account and will pay all the organization costs and expenses. Subsequent maintenance fees, the cost of independent professional services, such as legal, auditing and accounting services, and the cost of preparation and distribution of notices to participants and proxy statements are to be borne by the commingled Account. The Bank will, however, reimburse the Account for the compensation and expenses, if any, paid by the Account to the members of the Committee who are not affiliated with the Bank; the other members of the Committee will receive no separate compensation for their services to the Account. For these services the Bank receives a fee equal to 1/8th of 1 per cent of the average of the net asset value of the Account taken on each valuation date during each fiscal quarter, which is approximately ½ of 1 per cent on an annual basis.

Essentially, the commingled management agency Account as delineated by the Bank's plan consists of two principal members, the first being the membership of the Account consisting of the investor-customer, and the second being the Bank which occupies a dual position, one as investment adviser to the Account and the other as general agent to the participants of the Account. The Bank can also be considered to occupy the position of underwriter for the units of participation which are issued to the investor-customer. The Committee of the Account occupies a position equivalent to that occupied by the board of directors of the mutual funds.

The Account has been approved by the Comptroller, even though it does not essentially comply with all provisions of Regulation 9 as promulgated by him. This action indicates that even though the Account as presently structured does not meet every minute detail of the Regulation, any future plans similar to the one established by the Bank will obtain

his approval under 12 C.F.R. § 9.18(c)(5). Therefore, it is not necessary for this court to analyze the differences between the Account as established by the Bank and Regulation 9. For the disposition of the issues before this court, the Account will be treated as if it completely meets the substantive requirements of Regulation 9. 12 C.F.R. § 9.

Before the merits of the issues in this case can be reached, two preliminary procedural matters must be noted. The Comptroller interposes the objection that the plaintiffs lack standing to sue, and that there is no justiciable issue before this court.

These issues—standing and justiciability—are nominally termed procedural only to differentiate between the initial hurdles which a plaintiff must overcome in order to obtain a judicial determination of his action on the merits, and the actual adjudication of the case on its substantive issues. This characterization often borders on mere semantics, since in order to obtain the proper perspective and focus upon the essence of these issues, as here, the substantive law upon which the plaintiffs premise their action must also be taken into account.

Standing has been, and remains, one of the most enigmatic areas of the law. 3 Davis, Administrative Law Treatise, § 22.18, at 291-92, n. 3. The courts have not developed a single formula which can be applied to a set of facts to determine whether a plaintiff has or does not have standing. The ever changing concepts which have been used in this area of the law can be readily ascertained by the many cases which have been cited in the briefs of both parties upholding their contentions. Due to the pervasiveness of definition in this area, the court is left with no alternative but to examine the long list of cases which hold that a particular plaintiff has standing on one hand, and on the other the long list of cases where the plaintiff has been denied his day in court because of the lack of standing.

Standing has been generally expressed by an indication that the alleged aggrieved party has asserted a legal right

which was his to assert, or has been injured, or has been threatened with injury. Perkins v. Lukens Steel Co., 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940), cf. FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 60 S.Ct. 693, 84 L.Ed. 869 (1940), Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). But standing should not be confused with the doctrine of standing to sue which provides that in an action in a federal constitutional court, by a citizen against a government officer in his official capacity, there is no justiciable controversy unless the citizen shows that such conduct invaded or will invade a private substantive legally protected interest. Associated Industries of New York v. Ickes, 134 F.2d 694, 702 (2nd Cir. 1943) vacated as moot, 320 U.S. 707, 64 S.Ct. 74, 88 L.Ed. 414 (1943), but see Scott v. Macy, 121 U.S.App.D.C. 205, 349 F.2d 182 (D.C.Cir. 1965). The former standing is basically a means by which courts can accept or refuse jurisdiction, and it generally alludes to the capacity of a party to obtain judicial review of an administrative action. See United States v. Storer Broadcasting Co., 351 U.S. 192, 197, 76 S.Ct. 763, 100 L.Ed. 1081 (1956) and Jaffe, Primary Jurisdiction, 77 Harv.L.Rev. 1037 (1964). The doctrine of standing to sue is generally directed towards the capacity of a plaintiff to present his case before a district court *ab initio*.

The question as to whether a plaintiff may obtain judicial relief in cases like this has been variously phrased, but the many appellations which have been devised do not detract from the underlying policy objective which permeates each of these cases. This policy is well enshrined in Article III, § 2 of the United States Constitution, that is, a "constitutional" federal court cannot be given power to sit in judgment and revise administrative action, since there is no justiciable controversy and the opinion thus issued would merely be advisory. See concurring opinion of Mr. Justice Frankfurter in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 149, 150, 71 S.Ct. 624, 95 L.Ed. 817 (1951), Muskrat v. United States, 219 U.S. 346, 354,

31 S.Ct. 250, 55 L.Ed. 246 (1911), Chicago & Southern Airlines, Inc. v. Waterman Corp., 333 U.S. 103, 113, 68 S.Ct. 431, 92 L.Ed. 568 (1948), United Public Workers of America v. Mitchell, 330 U.S. 75, 89, 67 S.Ct. 556, 91 L.Ed. 754 (1947), Associated Ind. of New York v. Ickes, supra.

Standing to challenge an administrative action can be premised on a statutory provision specifically appended to the statute under which the administrative action was promulgated or where the provision for review has been made generally applicable by the Administrative Procedure Act, 5 U.S.C. §§ 701-704 (recodified by Pub. Law 89–554, 80 Stat. 378). Since there is no specific provision for review of the Comptroller's regulation within the terms of the enabling statute, Title 12, Section 1 et seq., the terms of the Administrative Procedure Act will apply. Citizens Nat. Bank of Maplewood v. Saxon, 249 F.Supp. 557 (D.C. Mo. 1965), affirmed Webster Groves Trust Co. v. Saxon, 370 F.2d 381 (8th Cir. 1966). See also United Gas Pipe Line Co. v. F. P. C., 86 U.S.App. 314, 181 F.2d 796 (1950), cert. denied 340 U.S. 827, 71 S.Ct. 63, 95 L.Ed. 609 (1950).

The pertinent section of the Administrative Procedure Act specifically provides that:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

Under this statutory provision a plaintiff must allege that he has suffered a legal wrong or that a legally protected right will be adversely affected or aggrieved by the agency's action in order to obtain standing before this court. The plaintiffs here are alleging that they are suffering a legal wrong by the allegedly illegal competition made possible by the Comptroller's regulation, thereby being adversely affected or aggrieved. The exact amount of damages which will be incurred by the plaintiffs is rather difficult to assess in precise figures, but the Comptroller has predicted that

over the next five to ten years, commercial banks might capture as much as two billion dollars of mutual fund business.[3] The defendant interposes that the competition, even if illegally promulgated, does not create any legal wrong for which the plaintiffs may complain.

In support of its contention that the plaintiffs are not suffering any legal wrong and thereby lack standing to challenged the Comptroller's regulation, the defendant relies on a series of cases which contain the general principle that mere competitive injury made possible by governmental action does not confer standing on the injured party to restrain governmental action. Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 137, 59 S.Ct. 366, 83 L.Ed. 543 (1938); Alabama Power Co. v. Ickes, 302 U.S. 464, 479, 58 S.Ct. 300, 82 L.Ed. 374 (1937); Perkins v. Lukens Steel Co., 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940); Texas State AFL-CIO v. Kennedy, 117 U.S.App.D.C. 343, 330 F.2d 217, 218 (1964); Benson v. Schofield, 98 U.S. App.D.C. 424, 236 F.2d 719 (1956), cert. denied 352 U.S. 976, 77 S.Ct. 363, 1 L.Ed.2d 324 (year); Kansas City Power & Light Co. v. McKay, 96 U.S.App.D.C. 273, 225 F.2d 924 (1955), cert. denied 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed. 780 (1955). In these cases, the plaintiffs alleged that they were suffering economic loss from the government created competition, but it is significant to note that the competition created by government action in these cases was specifically authorized and sanctioned by Congress and was based upon specific statutory grounds.

Moreover, most of the cases cited by the defendant in support of his allegation that the plaintiffs lack standing have been assiduously distinguished by subsequent decisions of the Supreme Court, even though they have not been expressly overruled. In City of Chicago v. Atchison, Topeka

[3]Hearings on H.R. 8499, 9410 before the Commerce and Finance Subcommittee of the House Committee on Interstate and Foreign Commerce, 88 Cong.2d Sess. p. 26 (1964). See also Comment, Of Banks and Mutual Funds: The Collective Investment Trust, 20 Sw. L.J. 334 (1966).

& Santa Fe Railway, 357 U.S. 77, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1958), the Supreme Court gave explicit recognition to a competitor's standing to challenge illegal competition. That case involved two competitors, one of whom (Parmlee) had alleged that the other (Transfer) was operating illegally because it had not complied with certain licensing requirements imposed by the City of Chicago. Transfer argued that Parmelee had no standing to object to Transfer's allegedly illegal competition, but this argument was flatly rejected by the Court:

> "It is enough, for purposes of standing, that we have an actual controversy before us in which Parmelee has a direct and substantial personal interest in the outcome. Undoubtedly it is affected adversely by Transfer's operation. Parmelee contends that this operation is prohibited by a valid city ordinance and asserts the right to be free from unlawful competition.
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> * * *
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> "[Transfer] argues that a party has no right to complain about lawful competition, citing Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374, and Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 108, 59 S.Ct. 366, 83 L.Ed. 543. We do not regard either of these cases as controlling here. It seems to us that Transfer's argument confuses the merits of the controversy with the standing of Parmelee to litigate them. * * * Parmelee's standing could hardly depend on whether or not it is eventually held that Transfer can lawfully operate without a certificate of convenience and necessity." 357 U.S. 77, at 83–84, 78 S.Ct. 1063, at 1067.

With regard to some later cases holding that competitors had standing, see American Trucking Ass'ns, Inc. v. United States, 364 U.S. 1, 80 S.Ct. 1570, 4 L.Ed. 2d 1527 (1960), National Motor Freight Traffic Ass'n v. United States, 371 U.S. 223, 83 S.Ct. 311, 9 L.Ed.2d 273, rehearing denied 372 U.S. 246, 83 S.Ct. 688, 9 L.Ed.2d 709 (1963), affirm-

ing 205 F.Supp. 592 (D.C.D.C.1962) only on the merits but not as to the standing issue; Philco Corp. v. FCC, 103 U.S. App.D.C. 278, 257 F.2d 656 (1958), cert. denied 358 U.S. 946, 79 S.Ct. 350, 3 L.Ed.2d 352 (1959); Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co., 116 U.S.App.D.C. 285, 323 F.2d 290 (1963), rev'd on other grounds, 379 U.S. 411, 85 S.Ct. 551, 13 L.Ed.2d 386 (1965).

In two recent cases challenging the authority of the Comptroller to promulgate regulations under other sections of the banking statutes, the plaintiffs have been granted standing to challenge the regulations over the objections of the Comptroller. Since these cases are directly in point they will be discussed at length. In Baker, Watts & Co. v. Saxon, 261 F. Supp. 247 (D.C.D.C. 1966), a number of plaintiffs, engaged in underwriting and distributing revenue bonds, sought a declaratory judgment that the Comptroller's regulations authorizing commercial banks, for the first time, to enter the revenue bond business violated the Glass-Steagall Act. The Comptroller raised the standing defense, citing the identical cases as brought forth in his present argument. Judge Holtzoff summarily disposed of that contention by stating:

> "The gravamen of the plaintiffs' claim for relief is that they are being subjected to competition by illegal activities of national banks. While no one may maintain a suit to restrain lawful competition merely because he is suffering an economic detriment, nevertheless, a person has a standing to complain against illegal competition, or specifically, against competition on the part of a person who lacks the legal right or power to pursue the competitive activities." 261 F.Supp. at 248.

Judge Holtzoff's opinion focuses not on the impairment of the plaintiffs' competitive position by the unlawfully created competition, but rather on the premise that but for the illegal competition condoned by the Comptroller's regulation, the plaintiffs would not have any economic detriment to base their complaint.

Likewise, in Georgia Association of Independent Insurance Agents, Inc. v. Saxon, 260 F.Supp. 802 (N.D.Ga. 1966), the district court denied a motion to dismiss for lack of standing. In that case the Comptroller had authorized, for the first time, national banks to sell insurance in towns with more than 5000 people, even though Section 92 of Title 12 of the United States Code permitted banks to act as insurance agents only in places with a population of 5000 or less. Plaintiffs were insurance agents and trade organizations representing insurance agents. Plaintiffs there alleged that the Comptroller was acting beyond his authority to issue the ruling which was in direct violation of 12 U.S.C. § 92 and that, as a result, national banks were able to illegally compete with the plaintiffs. The district court, in reaching its conclusion, observed that:

> "In Tennessee Electric Power Co., supra, and in Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374 (1937), the plaintiffs alleged that they were suffering economic loss from the government-created competition. In both cases the Supreme Court held that such economic loss alone did not confer standing on the aspiring plaintiffs. It is important to note that such competition was authorized by Congress and was based upon statutory grounds.
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> "In the instant case, the competition complained of is not explicitly authorized by statute, but rather is impliedly prohibited by the congressional grant of the power * * *." 260 F.Supp. at 803.

The district judge, in denying the Comptroller's motion to dismiss, further stated:

> "The Court is of the opinion that the defendant's attack on the plaintiffs' standing is without merit. Title 12 U.S.C.A.§ 92 has the effect of protecting insurance agents from certain competition. Surely, the plaintiffs have the right to their day in court to show that the protection afforded them by 12 U.S.C.A. § 92 has been violated." 260 F.Supp. at 804.

Subsequent to its finding of standing, the District Court ruled on the merits of the issues and granted the declaratory judgment and injunction which was sought by the plaintiffs. 268 F.Supp. 236 (N.D.Ga.1967).

Defendant places great reliance in his brief on the recent case of Pennsylvania Railroad Co. v. Dillon, 118 U.S.App. D.C. 257, 335 F.2d 292 (1964), cert. denied sub nom. American Hawaiian Steamship Co. v. Dillon, 379 U.S. 945, 85 S.Ct. 437, 13 L.Ed.2d 543 (1964).

In that case plaintiffs alleged not only that defendant Dillon had exceeded his statutory authority but also that the competitive activity which had been allowed was in and of itself illegal. The competing carriers challenged the authority of the Secretary of the Treasury to enroll certain vessels in the coastwise trade, allegedly in violation of the Merchant Marine Act of 1920, as amended, 46 U.S.C. § 883. That section prohibited the enrollment and documentation of vessels "jumboized" by installation of foreign-made midbodies. The Court of Appeals for the District of Columbia Circuit found that the carriers lacked standing even though they alleged the competition was illegal and in violation of the specific provision of the statute. The Court pointed out the dichotomy of Section 10 (a) of the A.P.A., namely the "legal wrong" aspect and the "adversely affected or aggrieved" aspect, as it related to the issue of standing and it concluded that:

> "Under either leg of Section 10(a), therefore, since appellants only complain of government enhancement of economic competition, they must demonstrate 'statutory aid to standing'." 335 F.2d at 295.

After analyzing the enabling statute the Court concluded that "Congress did not intend to insulate coastwise carriers from other domestic competition or to give them any legally protected right to be free of such competition." 335 F.2d at 295.

A close analysis of the holding in the *Pennsylvania Railroad*, supra, case does not require a determination of the standing issue adverse to the plaintiffs. In that case the Court of Appeals found that the underlying purpose of the statute under which the regulation was promulgated was to stimulate and encourage resort to domestic shipyards and thus to ensure them sufficient business so that their facilities would be adequate at times of national emergencies. 335 F.2d 292, at 295. The statutes, under which the regulation in issue was promulgated, were enacted to establish a clear Congressional policy which sought to separate national commercial banking from the securities business.[4] The primary intent of Congress was to segregate these functions and to allow separate entities to engage in these business areas. This clarity of purpose is garnered not only from the Congressional hearings reports of the Glass-Steagall Act, but also from the exactitude with which Congress has delineated the areas of common interest in this financial structure.[5] This strong general policy against the invasion of either field of endeavor by either entity is sufficient to postulate an interest upon which standing to challenge the regulation may be premised, cf. American Trucking Ass'ns, Inc. v. United States, 364 U.S. 1, 80 S.Ct. 1570, 4 L.Ed.2d 1527 (1960).

Therefore, by implication, the plaintiffs here have a right to complain of the competition which is being condoned under the Regulation. This competition is illegal in the sense that Congress has indicated its policy of separating the two financial institutions and this Regulation allows in an indirect manner a joinder of these interests. The plaintiffs

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[4]Hearings Pursuant to S.Res. 71 Before a Subcommittee of the Senate Committee on Banking and Currency, 71st Cong. 3rd Sess. (1931).

S.Rep. No. 77, 73d Cong. 1st Sess. (1933). H.R.Rep. No. 742, 74th Cong. 1st Sess. (1935).

See also 75 Cong.Rec. 9909 (1932) (remarks of Senator Bulkley).

[5]Note specifically amendments made to Section 24, par. Seventh of Title 12.

were the recipients by implication of Congressional protection.

Even if this invasion would not in fact cause a palpable injury[6] to be inflicted upon the plaintiffs which could be termed to be a legal wrong under the first leg of Section 10(a) of the A.P.A., now 5 U.S.C. § 702, the plaintiffs could have standing to represent the public interest as held in Sanders Bros. Radio Station v. F.C.C., 309 U.S. 470, 60 S.Ct. 693, 84 L.Ed. 869 (1940), Scripps-Howard Radio, Inc. v. F.P.C., 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229 (1942), and F.C.C. v. N.B.C. (K.O.A.), 319 U.S. 239, 63 S.Ct. 1035, 87 L.Ed. 1374 (1943). See the application of this doctrine by Judge Frank in Associated Industries of New York v. Ickes, 134 F.2d 694 (2nd Cir. 1943), vacated as moot 320 U.S. 707, 64 S.Ct. 74 (1943).

The practical effect of the doctrine advanced by those series of cases grants standing to challenge the legality of administrative action to one who is in fact adversely affected by administrative action. Standing in those instances is predicated upon the theory that the plaintiffs do not represent their own private property interests but rather the interests of the public. In the instant situation the plaintiffs could be classified as private "Attorneys General" based on the premise that the public policy dictated by Congress in the Glass-Steagall Act is not being adhered to by the agency charged with its enforcement. See Philco Corp. v. F.C.C., 103 U.S.App.D.C. 278, 257 F.2d 656 (1958), cert. denied 358 U.S. 946, 79 S.Ct. 350, 3 L.Ed.2d 352 (1959), where the competitive interest of a manufacturer and not a broadcaster was held sufficient to satisfy the "person aggrieved" provision of the Federal Communications Act. See also Jaffe, Standing to Secure Judicial Review: Public Actions and Private Actions, 74 Harv. L. Ref. 1265 (1961); 75 Harv. L. Rev. 255 (1961), and Davis,

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[6]Bantam Book v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963)–see also the discussion of the "Adversely Affected in Fact" doctrine promulgated by Prof. Davis, 3 Davis, Administrative Law Treatise § 22.02 (1965 Supp.)

3 Administrative Law Treatise §§ 22.04, 22.05, 22.11 (1958), (Supp. 1965).

Finally, a denial of standing, as urged by the defendant, would leave the plaintiffs and all others similarly situated without a right to seek redress against capricious, arbitrary and unwarranted Regulations issued by the Comptroller, however flagrant and contrary to the intent of Congress. This court, therefore, holds that the plaintiffs have standing to challenge the Comptroller's Regulation 9.

The Comptroller also asserts that there is no justiciable issue or controversy present in this case. This assertion is bifurcated on two grounds. The first is apparently premised upon the theory that the Comptroller's regulation permitting national commercial banks to establish the commingled Account does not regulate nor does it impose any obligation or duty upon the plaintiffs. The standards of justiciability are not limited to those situations in which the plaintiffs are directly regulated by the defendant government official. Indeed, in none of the branch bank cases in which the plaintiff was a state bank did the challenged regulations impose a duty upon or regulate the plaintiffs in any manner. e.g., First Hardin National Bank v. Fort Knox National Bank, 361 F.2d 276 (6th Cir. 1966); First National Bank of Smithfield, N.C. v. Saxon, 352 F.2d 267 (4th Cir. 1965); Union Savings Bank of Patchogue v. Saxon, 118 U.S. App. D.C. 296, 335 F.2d 718 (1964); Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co., 116 U.S.App.D.C. 285, 323 F.2d 290 (1963), rev'd on other grounds 379 U.S. 411, 85 S.Ct. 551, 13 L.Ed.2d 386 (1965), Commercial Security Bank v. Saxon, 236 F.Supp. 457 (D.C. D.C. 1964), affirmed First National Bank of Logan, Utah v. Walker Bank and Trust Co., 385 U.S. 252, 87 S.Ct. 492, 17 L.Ed.2d 343, (1966) rehearing denied 385 U.S. 1032, 87 S.Ct. 738, 17 L.Ed.2d 680 (1967). However, the justiciability assertion made by the Comptroller in each of these cases was decided adversely to the Comptroller.

The district court in Baker, Watts & Co. v. Saxon, supra, summarily rejected the Comptroller's contention, stating that:

> "* * * a justiciable controversy obviously exists justifying the Court in entertaining an action for a declaratory judgment. The plaintiffs claim that the defendant is authorizing national banks to conduct certain activities in violation of the law and that these activities transgress the powers of the banks and that they are injurious to the plaintiffs." 261 F.Supp. at 249.

The second ground for the lack of justiciability is premised on the theory that only the Comptroller can challenge the acts of a national commercial bank when it acts in excess of its powers. However, the primary thrust of the plaintiffs' allegation is directed not at the national bank which is acting under authority granted by the Comptroller, but rather at the scope of the authority under which the Comptroller promulgated the regulation in issue. The district court in Georgia Association of Independent Insurance Agents, Inc. v. Saxon, supra, simultaneous with its denial of the motion to dismiss for lack of standing, rejected the Comptroller's assertions on the issue of justiciability. It unequivocally stated that:

> "The defendant further contends that * * * the Comptroller is sole enforcer of the National Banking Act. This contention is impliedly repudiated by the repeated decisions that banks have standing to challenge an allegedly illegal order * * * and was explicitly repudiated in an opinion by the Fifth Circuit Court of Appeals which stated: 'The fact that the Comptroller is charged under 12 U.S.C. § 93 with the duty of enforcing the National Banking Act certainly does not have the effect of prohibiting actions to enforce that law by any other party who might have a legitimate interest. Jackson v. First National Bank of Valdosta, 349 F.2d 71, at p. 75 (1965).'" 260 F.Supp. at 804.

A recent Supreme Court decision inferentially rejects the Comptroller's arguments on the lack of justiciability, Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). The Supreme Court reversed and remanded to the Court of Appeals for the Third Circuit so that the Court of Appeals could consider the issues on the merits. The Court of Appeals had reversed the district court's decision without reaching the merits of the case, Abbott Laboratories v. Celebrezze, 352 F.2d 286 (3rd Cir. 1965). The district court had found that "a justiciable controversy arises where a plaintiff is confronted with substantial present or imminent harm. * * * the very presence of a threat of harm makes the regulations ready for review." 228 F.Supp. 855, 861 (D.C.Del.1964). The Court of Appeals reversed on the basis that no "actual case or controversy" existed as required for jusiticiability under the Declaratory Judgments Act. However, the Supreme Court decreed that "the impact of the regulations upon the plaintiffs is sufficiently direct and immediate so as to render the issue appropriate for judicial review at this stage." 387 U.S. at 152, 87 S.Ct. at 1517.

Having found that the plaintiffs have standing to seek redress and that they have presented a justiciable issue, we are now ready to seek a resolution of the subject matter involved in this litigation.

The principal issue involved in this controversy is whether or not the Comptroller has the statutory authority to empower national commercial banks to create, organize and manage the commingled Account. The gist of the activity of managing the Account consists of the purchase and sale of equity securities, nominally for long-term growth of capital and income, for the participating members. National Banks have only such powers as are expressly given by federal statute or by necessary implication therefrom, 12 U.S.C. § 24. Houston v. Drake, 97 F.2d 863 (9th Cir. 1938), Baltimore & O. R. Co., et al. v. Smith, 56 F.2d 799 (3rd Cir. 1932), and in some trust activities they may be authorized to act by the Comptroller in any capacity in which

competing state banks are permitted to act. 12 U.S.C. § 92a(a). See First National Bank in St. Louis v. State of Missouri, 263 U.S. 640, 44 S.Ct. 213, 68 L.Ed. 486 (1923), and Mercantile National Bank at Dallas v. Langdeau, 371 U.S. 55, 83 S.Ct. 520, 9 L.Ed.2d 523 (1962), City of Yonkers v. Downey, 309 U.S. 590, 60 S.Ct. 796, 84 L.Ed. 964 (1940), rehearing denied 310 U.S. 656, 60 S.Ct. 1071, 84 L.Ed. 1420, and Condon v. Downey, 310 U.S. 656, 60 S.Ct. 1071, 84 L.Ed. 1420, United States v. Palmer, 28 F.Supp. 936 (D.C.N.Y. 1939).

Authority to oversee trust activities of national banks which was vested in the Federal Reserve Board of Governors, 12 U.S.C. § 248(k) was repealed in 1962 when authority to regulate the fiduciary activities of national banks was transferred to the Comptroller. 12 U.S.C. § 92a, 76 Stat. 668, Pub.L. 87–722. Upon transfer of this authority the Comptroller issued Regulation 9 pursuant to which the First National City Bank established the commingled Account. In order to determine the validity of Regulation 9, it will be necessary to investigate each section of the relevant statutes and also to determine the intent of Congress when it enacted the relevant statutes. In order to complete the determination of the issues involved, it will also be necessary to determine whether or not the relevant state statute, here the N.Y. Banking Law, McKinney's Consol.Laws, c. 2, Section 100, allows local state banks to act in a similar fashion as is presently being allowed by Regulation 9.

This Regulation authorizes national banks to commingle managing agent accounts, allowing, therefore, the bank to purchase equity securities for the Account in general and not for any specific participating member. The essence of this activity is the purchase and sale of securities deriving thereby a benefit for the particpating members, and fulfilling the stated purpose of the Account.

The first statutory provision which is encountered along the logical progression to our conclusion is 12 U.S.C. § 92a

which delineates the trust powers which the Comptroller is authorized to grant to the national banks. Section 92a(a) provides:

> "The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located."

and under 12 U.S.C. § 92a(j) the Comptroller:[7]

> "* * * is authorized and empowered to promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein." 76 Stat. 668, Pub.L. 87–722 § 1.

Pursuant to this statutory authority the Comptroller can empower national banks the right to act in a fiduciary capacity and to issue regulations controlling this activity. From the statutory language it can be concluded that the Comptroller can grant trust powers to the national banks; but the real crux of this issue is whether or not the commingled Account can be considered a fiduciary activity as provided by the statute.

The Comptroller contends that there can be no doubt that the Bank's relationship to the participants in the commingled Account is a fiduciary relationship; however, this general statement, upon close analysis, is untenable. The principal-agent relationship arises from a contractual agree-

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[7]Section 11(k) of the Federal Reserve Act, as amended, 12 U.S.C. § 248(k) (repealed), empowered, in identical terms the Federal Reserve Board to issue regulations.

ment between the parties. The nature of this relationship gives rise to certain duties which are implied by the law, namely, a fiduciary duty and a duty of loyalty. The trustee and the agent have an equivalent duty of loyalty. The fiduciary duty of the agent is similar to but not the equivalent of the fiduciary duty of a trustee.

The many differences as to the characteristics of a principal-agent relationship and a trustee relationship are notable especially as they relate to the issue in this case. Consent of both principal and agent is a necessary requirement for the creation of the relation whereas the beneficiary of a trust need not consent. An agent is subject to the control of his principal, but a trustee is not subject to the control of the beneficiary. An agent can bind his principal by contract or otherwise, but a trustee has no such power with regard to his beneficiary. The agency relationship is terminable by the direction of the principal or by his death without any express provision to that effect, but this is untrue with respect to a trust unless the instrument so provides. See Restatement (Second) of Agency, Section 13, comment a, Section 14B, comments e to h, and Section 425, comment a. Note also Bogert, Trusts and Trustees, § 15 (2d. ed. 1965) p. 70 and Restatement of Trusts, 2d § 8, comment i.

The Bank and the individual participant of the Account enter into an agency relationship prior to or simultaneous with the participant's engagement with the Account. The Bank's role in this relationship is one of managing agent, not as trustee for the participant. A leading authority on the law of trusts has stated:

> "The duties and powers of the institution [e.g. a bank] as agent are determined by terms of the contract made with the customer; the duties and powers of the institution as trustee depend not only upon the terms of the trust but also upon the principles and rules of the common law and of statutes which are applicable to the trust relation. The liabilities of the instituion as agent depend upon whether it has failed to use due care in the perform-

> ance of the duties which it undertakes; its liabilities as a trustee depend upon whether it has committed a breach of trust. Ordinarily the responsibilities of the institution are more extensive where it acts as trustee than where it acts as agent, and it may incur no liabilities as agent for conduct which would render it liable if it were trustee." 1 Scott on Trusts, Section 8.1 Bank as Trustee or Agent (2d. ed. 1956).

The courts, as well as the recognized authorities in trust law, have distinguished sharply between the responsibilities of a true trustee and those of a managing agent, even where the latter is granted complete discretion in acting for his principal. It is, of course, established that the managing agent occupies a position of confidence, in which he must act with reasonable care and is held to a standard of conduct higher than that which prevails in the ordinary course of business in the marketplace. But the courts have stated plainly that this is not the high standard of care and strict accounting imposed upon a trustee, Stephens v. Detroit Trust Co., 284 Mich. 149, 278 N.W. 799 (1933); Anderson v. Abbott, 61 F.Supp. 888 (W.D.Ky. 1945); O'Connor v. Burns, Potter & Co., 151 Neb. 9, 36 N.W.2d 507 (1949). In both the *Stephens* and *O'Connor* cases the principal brought suit for accounting against the defendant managing agent on the basis that they had breached the high duty of care imposed upon a trustee. The decisive factor in both cases was that the relationship which existed between the parties had been freely chosen and established and, having entered into an agency contract, the investor could not assert that the relationship was in fact a trust.[8]

Contrary to the contentions made by the Comptroller, the managing agent relationship is not a true fiduciary relationship as it has been defined by the courts and by the recognized authorities in this field. Therefore, it is concluded that the managing agency relationship does not fall

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[8]But see, Saxon and Miller, Common Trust Funds, 53 Geo.L.J. 994, 1015, and Main, Common Trust Funds, 83 Banking L.J. 565.

within the traditional fiduciary powers as delineated in 12 U.S.C. § 92a(a).

Section 12 U.S.C. 92a(a), however, permits a national bank to act "in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located." This saving provision allows national banks to offer the equivalent fiduciary services to their customers that a local state bank might offer.

The Comptroller has authorized the First National City Bank, located in New York state, to establish a commingled Account pursuant to Regulation 9, and under the competitive provision of 12 U.S.C. § 92a(a) the authorization granted to First National City Bank may be legally valid, if the banking laws of New York state allow competing institutions to establish a commingled Account.

The general powers of state banks in New York state are contained in McKinney's Consol. Laws, c. 2, N.Y. Banking Law § 96 as amended, L. 1936, c. 324. These general powers have been supplemented by specific statutory provisions which grant state banks the power to act in a fiduciary capacity, N.Y. Banking Law §§ 100, 100–a, 100–b, 100–c, as amended. Each of these statutory provisions delineate the authorization of state banks with a definite degree of specificity, and none of the sections noted above allow a commingling of managing agency accounts. The only section which could even be deemed to inferentially grant this authority is Section 100–c, which relates to the power of banks to commingle funds held in a fiduciary capacity, specifically requiring that common trust funds be limited to moneys received and held "as executor, administrator, guardian, personal or testamentary trustee, donee of a power during minority to manage property vested in an infant or committee * * *."

A search of the New York state case law has failed to reveal any relevant judicial interpretation of this statutory

section. However, it has been held that state banks are prohibited to exercise any power which was not expressly granted. O'Connor v. Bankers Trust Co., 159 Misc. 920, 289 N.Y.S. 252 (Sup.Ct. 1936) affirmed 278 N.Y. 649, 16 N.E.2d 302; see also Nassau Bank v. Jones, 95 N.Y. 115, 47 Am.Rep. 14, (Ct. of App. 1884). These decisions indicate that New York state courts follow the federal rule, applicable to national banks, as expressed in Calif. Bank v. Kennedy, 167 U.S. 362, 17 S.Ct. 831, 42 L.Ed. 198 (1897), that the exercise of power not expressly granted to a national bank is prohibited. This restrictive interpretation of the powers granted under Section 100–c is further substantiated by noting that when the New York legislature has wanted to broaden the categories of accounts held and administered by banks which could be invested in a common trust fund, it has amended Section 100–c to do so.[9]

It is the conclusion of this court that the commingling of managing agency accounts is not authorized either under the federal statues or the New York banking laws.

Even if the managing agency accounts could be considered bona fide fiduciary activities, and, therefore, authorized by the present statutes, the commingling of these accounts would still be illegal under the provisions of the Glass-Steagall Act. In order to arrive at this determination it is necessary to make an exact characterization of the Account which was established.

As noted in the early section of this decision, a mutual fund continuously issues its own securities as does the com-

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[9]For example, that section was amended to permit a state bank acting as the "donee of a power during minority to manage property vested in an infant" to place the property so managed in a common trust fund, L.1958, c. 496 § 1; L.1965, c. 824 § 5. Note also the specific accounting and notice provisions which are contained in Section 100-c as strictly construed by the courts in In re Lincoln Rochester Trust Co., 201 Misc. 1008, 111 N.Y.S.2d 45 (1952). See also New York Banking Board Regulation, 3 N.Y.C.R.R. 11.91 which states that a common trust fund "may be operated only for true fiduciary purposes."

mingled Account. A mutual fund invests the proceeds from the sale of its securities in a diversified investment portfolio, in the same manner as the commingled Account. The mutual fund shares obtains for the investor an undivided interest in the fund's portfolio, as does a unit of participation in the commingled Account. Within certain limitations, a participating member of the Account can redeem his units of participation in a similar manner as the holder of mutual fund shares. A majority of the participating members elect the members of the Committee, who oversee the affairs of the Account in much the same manner as mutual fund stockholders elect their board of directors or trustees. The SEC has required the Account to register as an investment company under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 et seq. The SEC pursuant to its authority under 15 U.S.C. § 80-3(c), has granted certain exemptions to the requirements of the Investment Company Act as it relates to board membership;[10] nevertheless it has recognized the similarity between the Account and an investment company.[11] The Bank and the Committee have entered into a contractual agreement under which the Bank performs managing and advising functions for the Account. This contract is the equivalent of the contracts which are entered into by the mutual funds and their investment advisers. These contracts are subject to and must be submitted for review by the SEC under the provisions of the Investment Company Act. There are some differences between a

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[10]The exemptions which were granted are being challenged in the Court of Appeals for the District of Columbia Circuit, National Association of Securities Dealers, Inc. v. Security Exchange Commission, Appeal No. 20,164, decided Nov. 21, 1967.

[11]The similarity between mutual funds and the Account have been noted by many authorities in the financial community, see Hearings on S. 2704 on Collective Investment Funds Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, 89th Cong.2d Sess. (1966); University of Pennsylvania Law School Conference on Mutual Funds, 115 U.Pa.L.Rev. 669; and Comment, Of Banks and Mutual Funds, 20 Sw.L.J.

mutual fund and a commingled Account,[12] but these are not substantially sufficient to create a legal differentiation between the two investment vehicles. The similarities between these related activities are a sufficient basis to draw an analogy from which an equivalency can be premised.

The Comptroller attempts to differentiate between the mutual fund investment vehicle and the commingled Account by attempting to establish a major difference between a mutual fund share and a unit of participation. This differentiation is premised on the basis that the unit of participation is not a security as such. This is mere tautology and a matter of semantics.

The United States Supreme Court has noted that for the purposes of the Securities Act of 1933 the test for a security is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. SEC v. W. J. Howey Co., 328 U.S. 293, 301, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946). See also S.E.C. v. Variable Annuity Life Ins. Co., 359 U.S. 65, 79 S.Ct. 618, 3 L.Ed.2d 640 (1959) and Prudential Insurance Co. of America v. S.E.C., 326 F.2d 383 (3rd Cir. 1964), cert. denied 377 U.S. 953, 84 S.Ct. 1629, 12 L.Ed.2d 497 (1964). Under this all encompassing definition, in its most comprehensive sense, whenever an investor relinquishes control over his funds and submits their control to another for the purpose and hopeful expectation of deriving profits therefrom he is in fact investing his funds in a security. The unit of participation in the commingled Account is in fact a security and has been so recognized by the SEC by its requirement that the Bank register the units of participation under the Securities Act of 1933.

The Comptroller argues, however, that the definition of "securities" for the purpose of the Securities Act of 1933

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[12]See Hearings on S. 2704 (1966) supra, at pp. 55 and 56.

is not applicable to define "securities" as the term is used in the Glass-Steagall Act. He asserts that this definition as judicially and administratively derived has no relevance to the meaning of the various provisions of the national banking laws. He bases this assertion on the allegedly different purposes which the laws have, namely that the securities laws were enacted to protect the interests of investors while the banking laws were enacted to protect the country's credit and currency and the solvency of the national banks. This differentiation fails to focus upon the primary essence of the complete regulatory scheme which the Congress enacted to mitigate the problems that the country faced in the 1930s. Congress, after extensive investigation, realized that the financial community needed stabilization in order to overcome the debacle which arose in 1929 and to prevent any further recurrences. It would be inconsistent to conclude that Congress did not intend to obtain the equivalent meaning for the term "securities" as used in the Securities Act of 1933 when it used the term in the Glass-Steagall Act which was enacted by the same Congress.[13]

By finding that the Account is an equivalent investment vehicle to a mutual fund and that the units of participation are in fact securities, it is, therefore, necessary to determine whether or not the Bank is barred from these activities by the provisions of the Glass-Steagall Act, Sections 16, 20, 21 and 32, codified in 12 U.S.C. §§ 24, 377, 378 and 78 respectively.

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[13]The Federal Reserve Board has repeatedly ruled that participations or shares in mutual funds are securities for purposes of the Glass-Steagall Act, and it has similarly characterized the units of participation in the bank sponsored commingled managing agency account. Federal Reserve Board Legal Memorandum, "Legal Considerations Under Section 32 of the Banking Act of 1933 in Connection With the Proposed Commingled Investment Account of First National City Bank of New York" (Dec. 15, 1965) reprinted in Hearings on S. 2704 (1966) at 581-588.

The first relevant section is 12 U.S.C. § 24 dealing with the explicit powers granted to the national banks by the Congress. For our analysis only paragraph Seventh is pertinent. It states:

> "To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock: *Provided,* That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe. * * *"

The power of national banks to deal in securities has had a motley history, both legislatively and judicially. In 1823 the Supreme Court held that a prohibition against a national bank's trading and dealing in stocks was nothing more than a prohibition against engaging in the ordinary business of buying and selling stocks for a profit and it did not include purchases resulting from ordinary banking transactions. Fleckner v. Bank of the United States, 8 Wheat, 338, 351, 21 U.S. 338, 351, 5 L.Ed. 631 (1823). In First National Bank of Charlotte v. Nat. Exchange Bank, 92 U.S. 122, 23 L.Ed. 679 (1875), the Supreme Court stated that "Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power." 92 U.S. at 128. The Court in the First National Bank case was

interpreting, Rev.Stat. § 5136, par. 7, 15; 15 Stat. 101 § 8, the forerunner of 12 U.S.C. § 24 par. 7 which delineated the powers of the national banks.

The limitation on the national bank's power in security dealings was reiterated in subsequent decisions of the Supreme Court. Concord First National Bank v. Hawkins, 174 U.S. 364, 371, 19 S.Ct. 739, 43 L.Ed. 1007 (1898); California Nat. Bank v. Kennedy, 167 U.S. 362, 17 S.Ct. 831, 42 L.Ed. 198 (1897); McCormick v. Market National Bank, 165 U.S. 538, 17 S.Ct. 433, 41 L.Ed. 817 (1896); see also Birdsell Mfg. Co. v. Anderson, 20 F.Supp. 571 (W.D.Ky. 1937) affirmed 104 F.2d 340 (6th Cir. 1939), and Michelsen v. Penney, 135 F.2d 409, 424 (2nd Cir. 1943).

This implied limitation caused the national banks to establish security affiliates, organized under state law, to profit from underwriting and dealing in stocks and other securities. In 1927 Congress passed the McFadden Act which added to the list of banking powers in paragraph Seventh of Section 5136 of the Revised Statutes the following proviso:

> "Provided, that the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations evidencing indebtedness of any person, copartnership, association, or corporation, in the form of bonds, notes and/or debentures, commonly known as investment securities, under such further definition of the term "investment securities" as may by regulation be prescribed by the Comptroller of the Currency * * *. [Act of February 25, 1927 (McFadden Act), Section 2(b), 44 Stat. 1226]"

This proviso was intended to be a confirmation and a regulation of the investment security business which was being conducted by the banks through their security affiliates. H.R.Rep.No. 83, 69th Cong. 1st Sess. (1926). By the provisions of this Act, the national banks were authorized by statute to engage in the business of underwriting and dealing in investment securities.

The storms looming on the horizon were not within the contemplation of very many people in 1927. It was not until 1931 when the Congress, graced with hindsight, sought the primary causes of the debacle which enveloped the country and had its repercussions throughout the world. The Congressional inquiry generated various statutes in an attempt to avoid a repetition of the debacle which had transpired. Among these statues were the Glass-Steagall Act and the Securities Act of 1933.

The Glass-Steagall Act in particular redefined the powers of the national banks and imposed severe limitations on their activity in the investment security business by amending 12 U.S.C. § 24, par. 7, and adding 12 U.S.C. §§ 78, 377 and 378. Section 24, paragraph Seventh, has been noted above. The other relevant sections are noted below. Section 32 of the Glass-Steagall Act, now 12 U.S.C. § 78, provides:

> "No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments."

Section 20 of the Glass-Steagall Act, now 12 U.S.C. § 377, provides:

> "After one year from June 16, 1933, no member bank shall be affiliated in any manner described in subsection (b) of section 221a of this title with any corporation, association, business trust, or other

similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities: *Provided*, That nothing in this paragraph shall apply to any such organization which shall have been placed in formal liquidation and which shall transact no business except such as may be incidental to the liquidation of its affairs.

"For every violation of this section the member bank involved shall be subject to a penalty not exceeding $1,000 per day for each day during which such violation continues. Such penalty may be assessed by the Board of Governors of the Federal Reserve System, in its discretion, and, when so assessed, may be collected by the Federal Reserve Bank by suit or otherwise.

"If any such violation shall continue for six calendar months after the member bank shall have been warned by the Board of Governors of the Federal Reserve System to discontinue the same, (a) in the case of a national bank, all the rights, privileges, and franchises granted to it under chapter 2 of this title may be forfeited in the manner prescribed in sections 141, 222-225, 281-286 and 502 of this title, or, (b) in the case of a State member bank, all of its rights and privileges of membership in the Federal Reserve System may be forfeited in the manner prescribed in sections 321-332 of this title."

Section 21 of the Glass-Steagall Act, now 12 U.S.C. § 378, provides:

"(a) After the expiration of one year after June 16, 1933, it shall be unlawful–

"(1) For any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business

of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor: *Provided*, That the provisions of this paragraph shall not prohibit national banks or State banks or trust companies (whether or not members of the Federal Reserve System) or other financial institutions or private bankers from dealing in, underwriting, purchasing, and selling investment securities to the extent permitted to national banking associations by the provisions of section 24 of this title: *Provided further*, That nothing in this paragraph shall be construed as affecting in any way such right as any bank, banking association, savings bank, trust company, or other banking institution, may otherwise possess to sell, without recourse or agreement to repurchase, obligatons evidencing loans on real estate;

* * *

"(b) Whoever shall willfully violate any of the provisions of this section shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both, and any officer, director, employee, or agent of any person, firm, corporation, association, business trust, or other similar organization who knowingly participates in any such violation shall be punished by a like fine or imprisonment or both."

The obvious purpose of these legislative enactments was to divorce the banking business from the security investing business. Congress was so emphatic in promulgating this divorce, that it included a criminal provision to assure the efficacy and continuity of the separation; see 12 U.S.C. § 378(b), supra, and in some instances it imposed money penalties and forfeitures; see 12 U.S.C. § 377, supra. The many pages of legislative hearings reports which preceded the final enactment of the Glass-Steagall Act contain and outline the potential dangers which the involvement of commercial banking in the investment security business created.

These potential dangers were noted by the Comptroller of the Currency in his report of 1920, excerpts of which were cited by the Subcommittee of the Senate conducting the investigation:

> "Some 'securities companies' operating in close connection with, and often officered by, the same men who manage the national banks with which they are allied, have become instruments of speculation and headquarters for promotions of all kinds of financial schemes. Many of the flotations promoted by the 'securities corporations' which are operated as adjuncts to national banks have proven disastrous to their subscribers, and have in some instances reflected seriously not only upon the credit and the standing of the 'securities companies' by which they are sponsored, but also in some cases have damaged the credit and reputation of national banks with which the 'securities companies' are allied.
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> "It has been established clearly by decisions of the United States Supreme Court that a national bank can not, except as authorized by the Federal reserve act, hold the stock of other national banks or the stock of other corporations, but these adjunct or auxiliary companies whose stockholders are identical with the stockholders of the national banks with which they are connected by various ties and devices frequently deal actively in stocks, and they also sometimes acquire the ownership or control of other banks, National and State, through their stock purchases.
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> "In times of rising prices and active speculation some of these auxiliary corporations have made large profits through their ventures and syndicate operations, but their losses in other periods have been heavy, and they have become an element of increasing peril to the banks with which they are associated. The business of legitimate banking is entirely separate and distinct from the kind of business conducted by many of the 'securities corporations', and it would be difficult, if not impossible,

for the same set of officers to conduct safely, soundly, and successfully the conservative business of the national bank and at the same time direct and manage the speculative ventures and promotions of the ancillary institutions. These varying institutions demand a different kind of ability and experience on the part of those who manage them, and the two types of business when combined with one management are likely to be operated to the advantage of neither.

* * *

"These ancillary companies are being used with increasing frequency for promotion of speculation and for dealing in bonds and stocks, often those of new and unseasoned issues, and which are attended with improper hazard risk, and as a means of enabling banks to do, indirectly through their instrumentality, things which they can neither safely nor lawfully do directly." [See Hearings Pursuant to S. Res. 71 Before a Subcommittee of the Senate Committee on Banking and Currency, 71st Cong. 3d Sess. pp. 1067-1068 (1931)]

The Senate Subcommittee Report also outlined the organization and functions of the security affiliates. Among one of these functions was the operation of investment trusts which bought and sold securities purely for investment or speculative purposes, Hearings, S.Res. 71, p. 1057. These investment trusts were the equivalent of our present day investment companies.[14]

Another drawback which the Subcommittee Report recognized was that "in the case of a trust company or a bank with a trust department, the possession of a security affiliate may adversely affect the independence with which fiduciary activities are exercised." Hearings, S.Res. 71, p. 1064.

[14]S.E.C. Report on the Public Policy Implications of Investment Company Growth, H.R.Rep.No. 2337, 89th Cong. 2nd Sess. p. 33, Fn. 3 (1966).

There can be little doubt as to what Congress intended to do by the enactment of the Glass-Steagall provisions outlined above. Section 16, 12 U.S.C. § 24, par. 7 prohibits national banks from not only underwriting securities directly but also limits the capacity of the national banks in the purchase and sale of securities. Awotin v. Atlas Exchange Bank, 295 U.S. 209, 55 S.Ct. 674, 79 L.Ed. 1393 (1935); cf. United States v. Philadelphia National Bank, 374 U.S. 321, 329, 83 S.Ct. 1715, 10 L.Ed. 2d 915 (1963), First Natl. Bank in St. Louis v. State of Missouri, 263 U.S. 640, 44 S. Ct. 213, 68 L.Ed. 486 (1923), Genessee Trustee Corp. v. Smith, 102 F.2d 125, 127 (6th Cir. 1939), Guaranty Trust Co.. United States, 44 F.Supp. 417 (E.D. Wash.1942), affirmed 139 F.2d 69 (9th Cir. 1943), United States v. Palmer, 28 F.Supp. 936 (S.D.N.Y. 1939). Section 20, 12 U.S.C. § 377 effectively provides that national banks may not be affiliated with an entity which is engaged principally in the business of purchasing, selling, or underwriting securities. Section 21, 12 U.S.C. § 378 specifically provides that it is unlawful for any entity which is engaged in the business of purchasing, selling, or underwriting to also be engaged in the banking business. Section 32, 12 U.S.C. § 78 prohibits banks and investment organizations from having interlocking directorates, and common officials and employees. Through this legislative scheme Congress intended to separate these previously integrated activities, and it made its intent explicity clear. Merchants National Bank of Mobile v. Commissioner of Internal Revenue, 199 F.2d 657 (5th Cir. 1952); Commissoner of Internal Revenue v. Merchants Nat. Bldg. Co., 131 F.2d 740, 741 (5th Cir. 1942); cf. Paramount Pictures v. Langer, 23 F. Supp. 890, 902 (D.N.D.1938), reversed as moot 306 U.S. 619, 59 S.Ct. 641, 83 L.Ed. 1025 (1938), Morgan Stanley & Co. v. S.E.C. 126 F.2d 325, 329 (2nd Cir. 1942).

The Supreme Court has stated with specific relation to Section 32, 12 U.S.C. § 78, that "It [Section 32] is a preventive or prophylactic measure. The fact that respondents

appeal such order as may be entered herein and may or may not elect to prosecute ultimate appeals. Unless the Bank is permitted to intervene for the purposes set forth above, the Bank's ability to protect its interest will as a practical matter be impaired and impeded. The interests of the Bank and the interests of the Comptroller are not identical, and the Bank's interests will not be adequately represented by the Comptroller of the Currency.

Alternatively, under Rule 24(b) the Bank seeks to intervene on the ground that its participation in the action will present questions of law and fact common to those at issue between Plaintiffs and the Comptroller and intervention by the Bank will not unduly delay or prejudice the adjudication of the rights of the original parties.

There are attached hereto in support of this motion an affidavit of Robert L. Hoguet and a Memorandum of Points and Authorities.

In connection with this motion, the Bank hereby adopts and incorporates by reference Defendant's Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment and Defendant's Statement of Material Facts as to Which There is No Genuine Issue, both filed herein by Defendant on April 4, 1967.

Respectfully submitted,
STEPTOE & JOHNSON
/s/ Stephen Ailes
1250 Connecticut Avenue
Washington, D. C. 20036
223-4800

Attorney for First National City Bank

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

AFFIDAVIT OF ROBERT L. HOUGET IN SUPPORT OF FIRST NATIONAL CITY BANK'S MOTION FOR LEAVE TO INTERVENE AND MOTION TO GRANT A STAY

(Filed October 13, 1967)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

ROBERT L. HOUGET, being first duly sworn, deposes and says as follows:

1. I am an Executive Vice President of First National City Bank (the "Bank"), a national banking association with its principal place of business in the City and State of New York, and I am in charge of the Bank's Trust and Investment Division. I am also Chairman of the Committee for the Bank's Commingled Investment Account (the "Commingled Account"). I submit this affidavit in support of the Bank's Motion for Leave to Intervene as a Defendant and in support of its proposed Motion of Intervenor to Grant a Stay.

2. The Bank and its Commingled Account are referred to frequently in the Complaint in this action, in the Court's opinion of September 27, 1967, and in the proposed Order submitted by Plaintiffs on October 2, 1967. The Commingled Account is a collective investment fund established and operated by the Bank to permit it to accept relatively small "managing agency" accounts, i.e., fiduciary accounts where the Bank provides safe keeping for the customer's funds and securities and manages the investments in his account pursuant to a power of attorney giving the Bank broad investment discretion.

3. The Bank began operation of the Commingled Account in June 1966. It took that step only after:

(a) the Comptroller of the Currency approved the Commingled Account as a permissible form of col-

lective investment pursuant to Section 9.18(c)(5) of Regulation 9, 12 C.F.R. § 9.18(c)(5);

(b) The Board of Governors of the Federal Reserve System ruled that service by Bank officers on the Committee for the Commingled Account would not violate Section 32 of the Banking Act of 1933, 12 U.S.C. § 78;

(c) the Securities and Exchange Commission granted the Commingled Account certain exemptions from the Investment Company Act of 1940, 15 U.S.C. § § 80a-1 to 80a-52; and

(d) the Securities and Exchange Commission declared effective a registration statement under the Securities Act of 1933, 15 U.S.C. § § 77a-77aa, relating to participations in the Commingled Account.

In addition, the Federal Deposit Insurance Corporation announced that it believed that it was sound public policy to permit banks collectively to invest funds held in the capacity of managing agent for their customers. See *Hearings on S. 2704 Before a Subcommittee of the Senate Committee on Banking and Currency*, 89th Cong., 2d Sess. 25 (1966). It has been in reliance on these approvals and rulings that the Bank has proceeded with its plans for the Commingled Account.

4. The Bank has expended substantial sums of money, as well as the time and effort of its officers and employees, on the establishment of the Commingled Account. The total organizational expenses incurred by the Bank to date, including such items as legal and accounting fees and disbursements, printing costs and registration fees, amount to more than $300,000.

5. This action was commenced by Plaintiffs on April 25, 1966, only five days after the filing with the Securities and Exchange Commission of initial registration statements with respect to the Commingled Account. Although Plaintiffs were fully aware of these filings (see paragraph 13 of the Complaint herein), they made no attempt at that time

to obtain a preliminary injunction in this action that might have halted the Bank's steps to put the Commingled Account into operation. Even after operations commenced in June 1966, Plaintiffs made no attempt to stay the operation of the Commingled Account pending the outcome of this action.

6. By August 31, 1966, the end of the Commingled Account's first fiscal year, 214 persons had placed in the hands of the Bank approximately $2.7 million for investment through the Commingled Account. A year later, at August 31, 1967, the number of participants had increased to 621, the net amount received for investment had grown to $9.6 million and the net asset value of the Commingled Account stood at approximately $10.8 million.

7. Any attempt to halt the operation of the Commingled Account now, more than 16 months after operations began, would result in serious and irreparable injury to the Bank. If it should become necessary to liquidate the Commingled Account at this time and the decision of the District Court in this case were later overruled on appeal, much of what the Bank has already spent on the organization of the Commingled Account would be wasted, as would the Bank's expenses in connection with the liquidation of the Commingled Account and the distribution of its assets to the participants, the Bank would also unnecessarily incur substantial expenses in reestablishing the Commingled Account.

8. The participants in the Commingled Account will also be irreparably injured if the Commingled Account is not permitted to continue in operation pending appeal. Each person who has authorized the commingling of his funds through the Commingled Account has put at least $10,000 in the hands of the Bank. It is the policy of the Commingled Account to seek long-term growth of principal and income and the participants are not looking for short-term trading profits. They have committed substantial funds, and in many instances have done so as part of a long-range investment program which contemplates

the placing of additional funds for investment through the Commingled Account from time to time or at regular intervals. These participants would obviously be harmed by forced liquidation of the Commingled Account, with its attendant brokerage costs and realization of taxable gains. They would also be harmed by any order of the Court which did not permit them to continue their current investment program through the Commingled Account, including the right to invest additional sums and to reinvest distributions. Even if the Commingled Account were to continue intact, without liquidation, the existing participants would be injured unless additional customers of the Bank were permitted to come in as participants. If new participants were not taken in from time to time, the Commingled Account would inevitably shrink in size as a result of withdrawals (including automatic withdrawals upon the death or incompetency of participants). As the net assets were reduced, the ratio of the operating expenses to net assets would increase. On the other hand, if the Commingled Account is permitted to grow in size, the participants would have the benefit of a lower expense ratio. Finally, the existing participants would be irreparably injured by any order of this Court which restricted their rights to transfer participations as set forth in the Prospectus.

/s/ Robert L. Hoguet

[Jurat omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

ANSWER OF FIRST NATIONAL CITY BANK, INTERVENOR, TO PLAINTIFFS' COMPLAINT

(Filed October 13, 1967)

1. Intervenor, First National City Bank, a national banking association organized and existing under the laws of the United States with its principal place of business in the City and State of New York, by its attorneys, files this Answer in compliance with Rule 24(c).

2. Upon information and belief, Intervenor alleges that the collective fund for managing agency accounts maintained by it and approved by the Comptroller of the Currency under Regulation 9, 12 C.F.R. § 9, is the account referred to in Paragraph 12 of the Complaint herein, and the Intervenor is the bank referred to in Paragraph 5 of the Complaint.

3. The Intervenor, First National City Bank, adopts and incorporates by reference the Answer of the Defendant, Comptroller of the Currency, except for Paragraphs 13 and 15 of the Answer.

(a) In lieu of Paragraph 13 Intervenor states that it denies the allegations contained in Paragraph 13 of the Complaint except that it admits that on April 20, 1966, registration statements relating to the commingled investment account were filed with the Securities and Exchange Commission, and that on August 25, 1965, the Office of the Comptroller of the Currency issued a statement supporting and approving the plans of Intervenor to establish a commingled fund for agency accounts, and refers the Court to the text of such registration statements and of such statement by the Office of the Comptroller of the Currency for the terms thereof.

(b) In lieu of Paragraph 15 Intervenor states that it is without knowledge and information sufficent to form a belief as to the truth of the allegations contained in Paragraph 15 of the Complaint except that (i) it denies the allegations of the first sentence of said Paragraph 15, and (ii) it admits that it maintains a commingled investment account.

Respectfully submitted,
STEPTOE & JOHNSON
/s/ Stephen Ailes
1250 Connecticut Avenue
Washington, D. C. 20036
223-4800
Attorney for First National City Bank

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
[Title omitted in printing]

ORDER

(Filed November 9, 1967)

This cause came on to be heard on plaintiffs' Complaint for Declaratory Judgment and Injunctive and Other Relief and on cross motions for summary judgment filed by plaintiffs and defendant. All parties agreed that no disputed factual issues existed and that the legal issues were ripe for summary proceedings.

The court having considered the pleadings, the exhibits and attachments thereto, having heard oral argument on the motions, and having filed a Memorandum Opionion on September 27, 1967 containing the court's Findings of Fact and Conclusions of Law;

And, the court having found that Regulation 9 promulgated by the Comptroller of the Currency (hereinafter

"Comptroller"), Fiduciary Powers of National Banks and Collective Investment Funds", 12 C.F.R. § 9, authorizes the Bank to maintain collective investment funds exclusively for the collective investment and reinvestment of monies tendered thereto by the bank in its capacity as managing agent (hereinafter referred to as "managing agency collective investment funds"):

And, the court having further found that Regulation 9, insofar as it permits national banks to operate managing agency collective investment funds (i) violates the prohibitions of Sections 16, 20, 21 and 32 of the National Banking Act of 1933, as amended, codified in Sections 24, 377, 378 and 73, 12 U.S.C. respectively, and (ii) is beyond the power of the Comptroller under Section 92a(a), 12 U.S.C.:

And, the court having further found that the Comptroller approved the plan of the First National City Bank of New York for the establishment and operation of such a managing agency collective investment fund under the provisions of Regulation 9, 12 C.F.R. § 9;

And, it appearing that plaintiffs have standing for the reasons stated in the court's Opinion of September 27, 1967 to challenge the establishment and operation of managing agency collective investment funds pursuant to the provisions of 12 C.F.R. § 9, which provisions were declared unlawful in the court's Memorandum Opinion of September 27, 1967;

And, it further appearing that plaintiffs would suffer serious and irreparable injury by reason of the establishment and operation of managing agency collective investment funds pursuant to the provisions of 12 C.F.R. § 9, which provisions were declared unlawful in the court's Memorandum Opinion of September 27, 1967:

It is hereby ORDERED and ADJUDGED, as follows:

1. This court declares that those portions of Regulation 9, 12 C.F.R. § 9, which permit banks to engage in and operate managing agency collective investment funds are unlawful, inasmuch as they were promulgated in excess of the

Comptroller's statutory authority under Section 92a(a), 12 U.S.C., and are in violation of Sections 16, 20, 21 and 32 of the National Banking Act of 1933, as amended, codified in Sections 24, 377, 373 and 73, 12 U.S.C., respectively, and

2. This court declares that the Comptroller's approval of the plan of First National City Bank of New York to operate a managing agency collective investment fund under Regulation 9 is illegal, in excess of his statutory authority, void, and of no effect, inasmuch as it was made pursuant to regulations which are unlawful, as declared in paragraph 1 above.

3. The Comproller is hereby ordered forthwith to set aside any portion of Regulation 9 declared illegal pursuant to paragraph 1 above and is permanently enjoined from authorizing any bank to operate managing agency collective investment funds under such Regulation; and

4. The Comptroller is enjoined from continuing in effect any prior approval to any bank, including his approval of the plan of First National City Bank of New York, which might have heretofore permitted the operation of managing agency collective investment funds under Regulation 9, and is ordered to set aside forthwith and rescind any such prior approval; and

5. The provisions of this Order are hereby stayed pending the ultimate disposition of any appeal taken herein provided that the Comptroller shall not, pending appellate proceeding herein, authorize any national banks to commence the operation of a managing agency collective investment fund.

/s/ Joseph C. McGarraghy
JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

ORDER

(Filed November 21, 1967)

This cause came on to be heard on the motion of the applicant, First National City Bank, for leave to intervene as a defendant in this action under Federal Rule of Civil Procedure 24(a), and the Court having considered said motion and the pleading tendered therewith and the arguments advanced by the plaintiffs in opposition to that motion and it appearing to the Court that the applicant can be allowed to intervene as a party defendant pursuant to Rule 24(a) for the limited purpose of prosecuting an appeal from the judgment of this Court and of participating in further proceedings in this case, it is:

ORDERED that the motion of the applicant, First National City Bank, for leave to intervene as a party defendant in this action under Federal Rule of Civil Procedure 24(a) is hereby granted for the limited purpose of allowing the applicant to prosecute an appeal from the judgment of this Court and to participate in any proceedings subsequent thereto.

/s/ Joseph C. McGarraghy

Seen and approved as to form:

G. Duane Vieth
Irwin Goldbloom

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

NOTICE OF APPEAL TO COURT OF APPEALS

(Filed January 5, 1968)

Notice is hereby given that the Comptroller of the Currency, William B. Camp, defendant above named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on November 9, 1967.

/s/ Harland F. Leathers

/s/ Irwin Goldbloom

Attorneys, Department of Justice
Washington, D. C. 20530
Attorneys for Defendant Comptroller of the Currency

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

NOTICE OF APPEAL

(Filed January 5, 1968)

Notice is hereby given this day of , 19 , that Intervenor, FIRST NATIONAL CITY BANK hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 9th day of November, 1967 in favor of

Plaintiff, INVESTMENT COMPANY INSTITUTE against said Defendant, WILLIAM B. CAMP.

Archibald Cox
Stephen Ailes
Attorneys for Intervenor

Steptoe & Johnson
1250 Connecticut Avenue
Washington, D.C. 20036

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,164 September Term 1968

National Association of
Securities Dealers, Inc.,

Petitioner,

v.

Securities and Exchange Commission,

Respondent.

First National City Bank,

Intervenor.

No. 21,661
First National City Bank,

Appellant,

v.

Investment Company Institute, et al.,

Appellees.

No. 21,662
Comptroller of the Currency,
William B. Camp,

Appellant,

v.

Investment Company Institute, et al.,

Appellees.

On Petition for Review of an order of the Securities and Exchange Commission and on appeals from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge; Wilbur K. Miller, Senior Circuit Judge; and Burger, Circuit Judge.

JUDGMENT

These causes came on to be heard on petitioner's petition for review and on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel.

Upon consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the order on review herein in case No. 20,164 is hereby affirmed and it is

FURTHER ORDERED AND ADJUDGED by this Court that the judgments of the District Court appealed from herein in case Nos. 21,661 and 21,662 are hereby reversed.

Per Curiam.

Dated: June 21, 1969

Opinions will follow at a later date.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,164

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.,
Petitioner

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent

FIRST NATIONAL CITY BANK,
Intervenor

Petition to Review Orders of the
Securities and Exchange Commission

No. 21,661

FIRST NATIONAL CITY BANK,
Appellant

v.

INVESTMENT COMPANY INSTITUTE, et al.,
Appellees

No. 21,662

COMPTROLLER OF THE CURRENCY, WILLIAM B. CAMP,
Appellant

v.

INVESTMENT COMPANY INSTITUTE, et al.,
Appellees

Appeals from the United States District Court
for the District of Columbia

Decided July 1, 1969

Mr. Joseph B. Levin, with whom *Mr. Marc A. White* was on the brief, for petitioner in No. 20,164.

Mr. Archibald Cox, with whom *Mr. Stephen Ailes* was on the brief, for appellant in No. 21,661.

Mr. Alan S. Rosenthal, Attorney, Department of Justice, with whom *Assistant Attorney General Edwin L. Weisl, Jr.*, *Messrs. David G. Bress*, United States Attorney at the time the brief was filed, and *Robert C. McDiarmid*, Attorney, Department of Justice, were on the brief, for appellant in No. 21,662. *Mr. Irwin Goldbloom*, Attorney, Department of Justice, also entered an appearance for appellant in No. 21,662.

Mr. John A. Dudley, Assistant Director, Division of Corporate Regulation, Securities and Exchange Commission, with whom *Messrs. Philip A. Loomis*, General Counsel, *David Ferber*, Solicitor, and *Leonard S. Machtinger*, Attorney, Securities and Exchange Commission, were on the brief, for respondent in No. 20,164.

Mr. G. Duane Vieth, with whom *Mr. Charles R. Halpern* was on the brief, for appellees in Nos. 21,661 and 21,662. *Mr. Melvin Spaeth* also entered an appearance for appellees in Nos. 21,661 and 21,662.

Mr. Samuel E. Gates, with whom *Mr. Stephen Ailes* was on the brief, for intervenor in No. 20,164. *Mr. Henry C. Ikenberry, Jr.*, also entered an appearance for intervenor in No. 20,164.

Before: BAZELON, *Chief Judge*, WILBUR K. MILLER, *Senior Circuit Judge*, and BURGER, *Circuit Judge*.

PER CURIAM:* In these appeals the mutual fund industry levels a two-pronged attack on a national bank's authority to operate a collective investment fund as a service of its trust department. The fund is a commingled managing agency account, similar in most respects to an open-end mutual fund. First National City Bank's Commingled Investment Account (the Account) and other bank-sponsored funds likely to follow will compete with mutual funds and with those who market their shares. Competitors claiming that the Account is unlawful are the Investment Company Institute (ICI), an association of mutual funds and their investment advisers and underwriters; and the National Association of Securities Dealers (NASD), whose members sell shares in open and closed-end mutual funds.

The Account was registered with the Securities and Exchange Commission as an investment company under the Investment Company Act of 1940, 15 U.S.C. § 80a-1, and approved by the Comptroller of the Currency as a bona fide fiduciary activity authorized for national banks by § 92a of the Federal Reserve Act of 1913, 12 U.S.C. § 92a. The NASD intervened before the Securities and Exchange Commission to oppose the grant to the Account of exemptions from certain provisions of the Investment Company Act, and now seeks to set aside the Commission's orders granting them.[1] The ICI sued the Comptroller of the Currency and First National City Bank (the Bank) in the United States District Court for the District of Columbia for a declaratory

*These opinions were prepared prior to June 21, 1969 and are issued pursuant to the Judgment of this court entered on that date.

[1]The petition for review of the Commission's order was previously dismissed by this court on the ground that the NASD lacked standing as a party aggrieved under § 80a-42(a) of the Investment Company Act. *National Association of Securities Dealers v. Securities & Exchange Comm'n*, No. 20164 (decided Nov. 21, 1967). A petition for rehearing en banc was granted, and the division opinion vacated on January 1, 1968. The en banc order was subsequently vacated on April 12, 1968, to permit the assigned division to reconsider the matter. The case was consolidated for decision with Nos. 21661-62, and considered without reargument.

judgment invalidating so much of the Comptroller's Regulation 9, 12 C.F.R. § 9.18, as permits national banks to operate this type of account. Upon cross-motions for summary judgment, the District Court invalidated portions of the regulation and required the Comptroller to rescind approval of the Account. *Investment Company Institute v. Camp*, 274 F. Supp. 624 (1967). From that judgment, the Comptroller and the Bank appeal.

Each appeal raises difficult questions of competitors' standing. While a majority of the court has reservations about standing, these doubts have been resolved in favor of reaching the merits in cases of this consequence. On the merits, we are agreed that the actions taken by the Securities and Exchange Commission and the Comptroller are fully consonant with the statutes committed to their regulatory jurisdictions. Accordingly, we affirm the orders of the Securities and Exchange Commission and reverse on the merits the judgment of the District Court in favor of the Investment Company Institute. It is so ordered.

The opinion of Judge Burger, in which Judge Miller concurs, and the opinion of Chief Judge Bazelon, which follow, set forth the reasons for our action:

BAZELON, *Chief Judge*, concurring: First National City Bank's plan to operate a collective investment fund has generated complex and controversial issues for resolution by the Comptroller of the Currency and the Securities and Exchange Commission. Because this innovation in banking will create massive competition for the mutual fund industry, its members have brought the dispute to court. For the reasons stated at the conclusion of this opinion, I believe that representatives of the mutual fund industry have standing to adjudicate the important legal questions aired at length before the administrative agencies.

On the merits, the cases together present an interplay of administrative decisions designed to serve different but complementary regulatory aims. The Bank's plan straddles two

sets of statutes. The result is a complicated, if sometimes awkward, accommodation of the requirements of each. Petitioners below claim that this accommodation compromises the vital protection to investors and bank customers afforded by the securities and banking laws, and creates a dangerous blend of securities dealing and commercial banking. From an analysis of the relevant statutes and their legislative history, I conclude that the Account, subject to the mutually reinforcing regulations imposed by the Comptroller and the Commission, was established in accordance with law.

I

INTRODUCTION

Since 1962, the Comptroller has exercised authority under § 92a of the Federal Reserve Act to grant national banks, by special permit, the authority to exercise trust and other fiduciary powers,[1] namely:

> . . . to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

Section 92a(j) authorizes the Comptroller to issue such rules as he deems necessary to enforce the proper exercise of those powers. In April 1963 the Comptroller issued revised Regulation 9, 12 C.F.R. § 9.18, which authorized for the first time the commingling of managing agency accounts under national banks' fiduciary powers.

The background of Regulation 9 needs brief mention. Since the thirties, banks have been authorized to act as

[1] Regulatory responsibility for the fiduciary activities of national banks was transferred from the Federal Reserve Board to the Comptroller pursuant to Public Law No. 87-722, 76 Stat. 668 (1962), codified at 12 U.S.C. § 92a (1964).

managing agents to purchase and sell stock for a single principal, 1934 *Fed.Reserv.Bull.* 609, but the cost of bank management made it prohibitive to offer this service to investors without very substantial assets. For example, the Bank's minimum for an individual managing agency account is $200,000. Prior to 1963, national banks were authorized by the Federal Reserve Board to commingle and invest customers' funds only if held in its capacities as trustee, executor, administrator, or guardian, and funds held as part of a tax-exempt pension and profit sharing or stock bonus plan of employers for the benefit of employees. Regulation F, 12 C.F.R. § 206 (1959 Rev.). The Federal Reserve Board, moreover, had consistently taken the view that common trust funds should not be used as a medium to attract customers primarily seeking investment management of their funds.[2] After the responsibility for regulating bank trust powers was transferred to the Comptroller, that office concluded, after study, that existing regulations should be broadened to extend the advantages of collective investment to managing agency accounts.

The Bank proposed the establishment of a commingled managing agency account pursuant to the revised regulation.[3] Under the Bank's plan, a customer deposits a minimum of $10,000 under a broad authorization permitting the Bank to invest the funds with those of other partici-

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[2] 26 *Fed. Reserve Bull.* 393 (1940), 12 C.F.R. § 206.102 (1947); 42 *Fed. Reserve Bull.* 228 (1956); and see 25 Fed.Reg. 12479 (1960), announcing the Board's intention to investigate whether the common trust fund regulations should be amended to exclude inter vivos trusts, because the device of the revocable trust could and had been used to obtain investment management through a common trust fund.

[3] The Bank's plan does not conform in all respects to Regulation 9 as originally issued due to the adjustments required to satisfy the requirements of the Investment Company Act. The plan, as amended, received the Comptroller's written approval under 12 C.F.R. § 9.18 (c)(5), and it is expected to set the pattern for other bank-sponsored investment funds. There is accordingly no need to review the provisions of Regulation 9 as it was originally promulgated.

pants in the plan. The customer is a principal, and the Bank, his managing agent. The customer receives an undivided interest in the fund, expressed as a "unit of participation." These units are redeemable at net asset value, and are not transferable except to other participants in the plan. No sales load or redemption charge can be imposed.

The Account is registered as an investment company under the Investment Company Act, and the units of participation are registered as securities under the Securities Act of 1933, 15 U.S.C. § 77a (1964). The Bank is both investment adviser to the Account and statutory underwriter for the units of participation issued. The Account is subject to a Committee with the powers of a board of directors, whose members are elected annually by the participants. The Bank sought and received exemptions from provisions in the Investment Company Act which would have required that a majority of the Committee be unaffiliated with the Bank. The Securities and Exchange Commission required that at least two of the five Committee members must be persons unaffiliated with the Bank, but the other three will normally be officers of its Trust and Investment Division.

The Account is managed by the Bank pursuant to a management agreement which must be approved by the participants at their first annual meeting. Thereafter, the contract must be approved annually by the participants or by the Committee, including both Committee members unaffiliated with the Bank.

The Account is the functional equivalent of an open-end mutual fund, but there are several differences. The Comptroller's regulations provide that the units of participation or shares may not be marketed through regular channels of public distribution; participation is offered and publicized only through the Trust Department. 12 C.F.R. § 9.18(b)(5)(iii) and (iv) (1968). The Bank's compensation is limited by regulation to the sum of the fees normally charged for separate management of such accounts, namely, ½ of 1 percent per annum of the average net asset value of

the fund. 12 C.F.R. § 9.18(b)(12). Finally, and most important, the Account is under the supervision of the Comptroller like other banking functions. This includes review of the fund's investments to see that they are in accordance with sound fiduciary principles. 12 U.S.C. § 481 (1964), 12 C.F.R. § 9.11(d) (1968).

II

Validity of the Account Under the Banking Laws

The District Court held that the Account is unlawful on two grounds: (1) the commingled managing agency account is not a fiduciary activity within the purview of § 92a of the Federal Reserve Act and is not open to State banks under the law of New York, and (2) the maintenance of the fund violates §§ 16, 20, 21, and 32 of the Glass-Steagall Act, 12 U.S.C. §§ 24 (seventh), 377, 378, 78 (1964).

A. *The Federal Reserve Act*

The District Court relied on the differences between the trustee and agency relationships, noting especially the higher standard of care of a trustee, to conclude that a collective managing agency account was not a true fiduciary activity within the purview of § 92a of the Federal Reserve Act. The differences between the traditional trust relationships of trustee, executor, or administrator and the contractual principal-agent relationship do not, in my view, make the agent any less a fiduciary, nor does commingling of funds, subject to the principal's authorization, change the fiduciary character of the duty owed to each. *Brown v. Christman*, 75 U.S.App.D.C. 203, 126 F.2d 625 (1942). The District Court apparently recognized that the Account might pass muster under the phrase authorizing banks to act "in any other fiduciary capacity," but held that it did not qualify as an activity open to competing State banks under the New York law.

Section 100-c of the New York Banking Law specifically authorizes trust companies to commingle funds held in the

strict trust capacities, but New York law contains no specific grant of authority to commingle funds held as managing agent. The District Court concluded that the absence of such authority was an implied prohibition. Section 100-c, however, simply permits commingling in cases where the governing trust instrument does not authorize it. The conditions on commingling imposed by § 100-c have not been imposed upon collective accounts authorized by a trust instrument. The real question, therefore, was whether commingling was permissible under the general authority of § 100, which empowers a State bank to act as agent for any lawful purpose and to manage a principal's funds according to the terms of the power conferred upon the bank. N.Y. Bank. Law § 100(1) and (5) (McKinney 1950).

Since the decision of the District Court, the New York State Banking Department has given formal approval of commingled managing agency accounts to two New York banks, stating that the operation of the accounts is authorized by § 100 of the Banking Law. Appellee ICI describes this approval as a defensive response to enable State banks to meet the national banks' competition. This is surely true. Prior to the Comptroller's issuance of revised Regulation 9, no State banks operated commingled managing agency accounts. Still, the Banking Department's action cannot fairly be dismissed as merely following the Comptroller's lead. The question of whether collective accounts are a proper fiduciary activity for banks appears to have been open under both Federal and New York law, and both banking agencies could reasonably have resolved it the same way.

The Bank concedes, of course, that the commingling of managing agency accounts represents a departure from past banking practice of limiting commingling to funds held by the bank in the traditional trust capacities and as trustee of a pension or profit-sharing trust. Regulation 9.18 permits banks to serve multiple principals under a standard agreement vesting the bank with broad discretion

to invest their money, subject to the duties and liabilities of a managing agent, and not a trustee. This is a new and free-wheeling form of fiduciary activity.

I am persuaded, however, that the Comptroller's regulations, together with the protection of the customer *qua* investor afforded by the securities acts, will reasonably assure the proper exercise of this broad fiduciary power. The restrictions imposed by Regulation 9, 12 C.F.R. § 9, secure the Comptroller's powers of examination and supervision of the Account. (§§ 9.8, 9.9.) The rules safeguard the fiduciary relationship by requiring the separation of the Account's funds from other assets (§§ 9.13, 9.18(b)(2)), by enforcing the obligations to refrain from self-dealing and conflicts of interest (§§ 229.10, 9.12, 9.18(b)(8)), and by limiting the Bank's charge to its normal fiduciary compensation (§§ 9.15, 9.18(b)(12)).

The major difference between the Bank's relationship to the customers of the Account and its relationship to the beneficiaries of other management and trust services is the absence of an individually negotiated agreement. The character of the Bank's initial advice and ultimate accountability to the customer is necessarily altered by a package deal offered to all comers. This was one reason why the Securities and Exchange Commission required registration of the Account.[4] The provisions for disclosure and participant control contained in the securities laws substantially compensate for the drawbacks of a standardized fiduciary service. The Securities Act of 1933 requires that potential customer-investors receive a prospectus describing the management of the Account, its investment objectives and policies, and the rights of participants. 15 U.S.C. § 77j (1964). Periodic reports and proxy statements must be issued for inspection by both the participants and the Commission. §§ 80a-20(a) and 80a-29(d). Pursuant to the provisions of

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[4]See Statement of then Chairman Manuel F. Cohen, *Hearings on S. 2704 Before a Subcommittee of the House Committee on Banking and Currency*, 89th Cong., 2d Sess. 132-38 (1966).

the Investment Company Act, participants in the Account will elect their directors (§ 80a-16(a)), retain the power to terminate the contract (§ 80a-15(a)(3)), and ratify the selection of auditors (§ 80a-31(a)(2)). The interests of the principals participating in the Account, though not identical, are bound to be similar; and as a group, they possess a measure of control over the management of their money. Dual regulation by the Comptroller and the Commission should assure the proper operation of the Account.

B. *The Glass-Steagall Act*

The District Court held that the Comptroller's authorization of the Account violated four provisions of the Glass-Steagall Act. It held that in the issuance of units of participation, the Bank was engaged in the business of dealing in securities for its own account in violation of §§ 16 and 21, and that the relation between the Bank and the Account was an affiliation or interlocking directorate between a bank and an organization principally engaged in the securities business in violation of §§ 20 and 32 of the Act.

(1) *Sections 16 and 21*

Section 16 of the Glass-Steagall Act imposes the following limitation upon bank dealing in securities:

> . . . The business of dealing in securities and stock by the [national banking] association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock. . . . [12 U.S.C. § 24 (seventh).]

Section 21 of the Act prohibits commercial banks from engaging in the business of "issuing, underwriting, selling or distributing" most types of securities.[5] Because the units

[5]The Glass-Steagall Act permits banks to market government revenue bonds backed by the taxing power of the public authority issuing the bonds. 12 U.S.C. § 24 (Seventh). The Comptroller's regulation broadening bank underwriting authority to include revenue bonds was

of participation in the Account are securities, and the Bank is the statutory underwriter under the Securities Act of 1933, the District Court held that the Bank is engaged in the selling and underwriting of securities prohibited by §§ 16 and 21 in operating the Account.

The words security and underwriter in the Securities Act of 1933 are terms of art with a high gloss. Their expansive definitions under the Securities Act cannot be imported wholesale into the Glass-Steagall Act when the two statutes serve different purposes, in different contexts of risk to the public. The securities laws are intended to protect investors, primarily through disclosure requirements. Their terms have been interpreted broadly to afford their protection to purchasers of all manner of investment interests, wherever it is needed. The Glass-Steagall Act, by contrast, was enacted to protect bank depositors and the banking system from the risk of insolvency incident to widespread investment of banks' assets in speculative secu.ities during the twenties. Banks frequently not only invested in speculative securities, but entered the business of investment banking by underwriting original issues. Some of these activities were undertaken directly; others were carried on by securities affiliates formed and controlled by the banks to evade completely the weak restrictions upon direct bank dealing in speculative securities. Section 16 of the Act was addressed to three problems:

> (1) Banks commonly invested their own assets in securities, risking commercial and savings deposits if the securities declined in value.[6]
>
> (2) Direct bank investment in securities created pressure for banks to make unsound loans to main-

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invalidated in *Baker, Watts & Co. v. Saxon*, 261 F.Supp. 247 (D.D.C. 1966), *affirmed sub nom. Port of New York Authority v. Baker, Watts & Co.*, 129 U.S.App.D.C. 173, 392 F.2d 497 (1968).

[6] *Hearings Pursuant to S.Res. 71 Before a Subcommittee of the Senate Committee on Banking and Currency*, 71st Cong., 3d Sess. 1055-66 (1931).

tain the price of securities or the financial position of companies in which the bank had holdings.[7]

(3) Large city banks frequently acted as issuers, or underwriters of blocks of securities, distributing them at a profit through correspondent country banks. The banks' pecuniary interest in the ownership, price, or distribution of securities created incentive to steer customers into investing in what the banks had to sell.[8]

The problem of risk to deposits does not arise here, because the securities in the fund are purchased for the account of the customer, not the Bank. The ICI does claim, however, that the Bank's indirect holdings in the Account may amount to an interest in individual companies sufficient to influence its credit decisions. The short answer is that, since this indirect risk is present in all bank investments in securities for the account of customers, that problem was not within the contemplation of the Glass-Steagall Act.

With regard to the third abuse treated by § 16, the ICI points out that because the Bank's compensation is tied to the size of the fund, there will be pressure to market the participations to maintain and increase its assets. I agree.[9]

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[7] *Id.* at 1063-64.

[8] See Address of Senator Bulkley, 75 Cong.Rec. 9912 (1932).

[9] The Bank would have us stress the restrictions upon merchandising the Account. The Bank is authorized to offer participations in response to unsolicited requests, to persons on Bank premises, and to existing customers. The Bank's affidavit states that it will accept the customer's money if it is satisfied that the Account's investment policy is suited to his needs. It appears from the mailing to "valued customers," however, that they will be acceptable if they read the invitation, with its caveats, and the prospectus and send in the tear-out authorization with $10,000. The $10,000 minimum should accomplish a measure of natural selection, but the Bank's decision on the customer's suitability is unlikely to be so discriminating that the decision itself is a check on the issuance of participations. At any rate, the merchandising problem is more relevant to the question of the proper exercise of fiduciary powers than to entry into the securities business within the meaning of the Glass-Steagall Act.

But the Bank is under similar pressure to sell all the services of its trust department. The Bank's interest in earning a regulated fiduciary charge bears little resemblance to its interest in earning an indeterminate distributing profit from securities which it owns or underwrites, and the interest forbidden by § 16 is the latter.

Section 21 of the Act prohibits banks from engaging " . . . in the business of issuing, underwriting, selling or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities . . . ." It was enacted to extend the prohibitions of § 16 to members of the Federal Reserve System who were not national banks. Congress did not intend to bar those banks from buying and selling securities "for the account of customers," so § 21 appears to add nothing to the argument under § 16. If anything, the language of § 21 confirms the view that Congress was concerned in both provisions with prohibiting bank dealing in speculative securities for the traditional and direct form of distribution profit.[10]

(2) *Sections 20 and 32*

Sections 20 and 32 of the Act were enacted to maintain the separation between commercial banking and securities dealing by prohibiting interlocks and affiliations of personnel. Section 20 forbids certain types of bank affiliation with any organization "engaged principally" in the same brand of securities dealing forbidden as a direct bank activity by § 21. One type of prohibited affiliation, defined in

[10]Section 21 provides criminal penalties for willful violations. The Attorney General is charged with prosecutions under § 21, and has indicated that, while it is not clear whether the operation of the Account would involve criminal liability, the approval of the banking agencies precludes a prosecution against the Bank. See letter of January 24, 1966, to the Securities and Exchange Commission from Assistant Attorney General Fred M. Vinson, in *Hearings on S. 2704 Before a Subcommittee of the House Committee on Banking and Currency, supra* n. 4 at 588.

§ 221a(b)(3), ordinarily exists when a majority of the directors of a securities organization are also directors of any one member bank.

Section 32 generally prohibits directors, officers, or employees of organizations "primarily engaged" in securities dealing from serving in those capacities for a member bank. The Federal Reserve Board has consistently held that § 32 prohibits bank officials from serving as officials of open-end investment companies because such companies (mutual funds) are primarily engaged in issuing their own shares. 12 C.F.R. § 218.101 (1951). The Board ruled, however, that the Account and the Bank were a single entity for purposes of § 32, since the Account would be a department of the Bank except for purposes of the Investment Company Act. So long as the Account remained under the "effective control" of the Bank, the Board stated that there was no prohibited interlock under § 32. 30 Fed.Reg. 12836 (1965), adding 12 C.F.R. § 218.111(j) (1965).[11]

The participants' reserve power to sever the connection with the Bank would be worth something in the event of extraordinary mismanagement, but barring this contingency, the Account will remain part of the Bank's organization. Under the single entity theory, the Bank cannot interlock with itself, but that is not really the point. The clear purpose of §§ 20 and 32 is to prevent banks from entering into prohibited forms of securities dealing by the back door. We have held that the Bank may enter the business of operating the Account by the front door. The organizational pattern imposed to satisfy the requirements of the Investment Company Act does not in this context create a prohibited interlock or affiliation any more than the Account itself constitutes a forbidden excursion into the securities business.

[11]See also the Board's letter of March 31, 1966, to the Bank stating that its ruling would stand even though the Securities and Exchange Commission required that there be two independent directors, or 40 percent of the Committee, instead of the single unaffiliated director proposed by the Bank.

The establishment of a bank-sponsored collective investment fund is not barred by the banking laws. A commingled managing agency account is a descendant of the individual managing agency account and the common trust fund, fitting within the traditional authority of banks to manage other people's money in a fiduciary capacity sanctioned by the Federal Reserve Act. Where the fiduciary tie between the bank and multiple principals is looser, the Comptroller's regulations and the securities laws will take up the slack. The essential element in this judgment on the applicability of the Glass-Steagall Act is the fact that the securities in the Account are bought and sold for the account of customers. The sale of an investment service to a potentially large number of customers gives rise to obligations under the securities laws, but these do not convert otherwise lawful transactions for the account of customers into prohibited securities dealings within the meaning of the Glass-Steagall Act.

The major consequence of expanded investment service by banks will be a quantitative change in the volume of securities bought, sold, and held by banks. While substantial transactions in securities by banks may be essential for the modern management of their customers' money, an increase in their already massive securities holdings for the account of customers has some disquieting consequences for the underpinnings of corporate accountability and competition in the economy at large.[12] The dimensions of the problem are broader, however, than the banking laws on the books. The Glass-Steagall Act enforces the separation

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[12]For recent comment on the power of banks as institutional investors to control so-called publicly held corporations, see *Studies by the Staff of the Cabinet Committee on Price Stability* 52-54 (Jan. 1969). See also a warning that the trend toward conglomerate banking makes it possible for banks to condition access to credit upon the borrower's use of the bank's other services and dealings with its subsidiaries in "The Growth of Unregistered Bank Holding Companies –Problems and Prospects," *Staff Report for the House Committee on Banking and Currency*, 91st Cong., 1st Sess. 2 (1969).

of commercial banking and a particular kind of securities dealing. Its legislative history affords little support and even less guidance for a judicial decision to limit bank transactions in securities for customers because today they differ in degree.

III

Validity of Exemptions from § 10 of The Investment Company Act

The NASD, for its part, claims that the Bank's control of the Account is all too effective. It contests the orders by the Securities and Exchange Commission granting certain of the exemptions from § 10 of the Investment Company Act requested by the Bank prior to registration of the Account as a diversified, open-end management investment company under the Act. The exemptions together permit three or 60 percent of the Account's five-member Committee to be persons affiliated with the Bank.

Section 10 of the Act was enacted to protect shareholders of investment companies from exploitation by insiders with conflicting interests in other companies or lines of business by requiring that a certain percentage of directors be free of affiliations which may involve divided loyalties. Without the exemptions, § 10 of the Act would preclude the Account from having a majority of directors who are officers, directors, or employees of (1) a principal underwriter, 15 U.S.C. § 80a-10(b)(2), (2) investment bankers, § 80a-10(b)(3), and (3) a single bank, § 80a-10(c). While the Bank fits each of these statutory categories, the overriding issue is the propriety of the exemption granted from § 10(c) to permit a maximum of three instead of two Bank officers to serve on the five-member Committee. A working majority of Bank directors was essential to allow the Account to function in conformity with the banking laws.

Before considering the exemption from § 10(c), it bears emphasis that there is nothing unusual in the fact that the Bank as investment adviser has majority control of the

Committe of the Account. Open-end investment companies have traditionally been controlled and managed by their investment advisers; investors are buying their advice. Section 10(a) of the Act provides that 60 percent of the directors of an investment company may be affiliated with the investment adviser. Section 10(d), moreover, permits certain types of "no-load" funds to have only one unaffiliated director if they meet specified conditions. The Bank sought but was denied an exemption which, if granted, would have enabled it to have only one unaffiliated Committee member.[13]

Given these facts, the NASD's assertion that the Committee will abdicate its supervisory responsibilities because the Bank has "effective control" of the Account in the eyes of the banking authorities requires a showing of something more than the normal pattern of majority control by an investment adviser. Nothing in the Comptroller's regulations still applicable precludes the Committee from exercising its responsibilities. Although Regulation 9, as originally promulgated, did not take account of the requirements of the Investment Company Act, all provisions of Regulation 9 inconsistent with that Act were superseded by the Comptroller's written approval of the Account in the form necessary to satisfy the Securities and Exchange Commission. The Bank's majority control for purposes of day-to-day management of the fund is a false problem. The real issue is whether exemptions allowing an extra director on the Bank side will undercut the Committee's watchdog role in areas of potential conflict of interest.

Section 6(c) of the Investment Company Act empowers the Commission to grant exemptions from the Act, or any

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[13]Notwithstanding the provisions of §§ 10(a) and 10(b)(2), § 10(d) permits all but one of the directors of certain types of "no-load" funds to be affiliated with the investment adviser if certain conditions are met. 15 U.S.C. § 80a-10(d). To qualify for the exception under § 10(d), the Bank would have had to register as an investment adviser, principally involved in that business. An exemption from this condition was denied.

rule or regulation adopted under it, " . . . if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions" of the Act. 15 U.S.C. § 80a-6(c). The Commission has exercised this authority to exempt persons not within the intent of the Act and generally to adjust its provisions to take account of special situations not foreseen when the Act was drafted. *Transit Investment Corporation*, 28 S.E.C. 10, 16 (1948); *The Atlantic Coast Line Company*, 11 S.E.C. 661, 666-67 (1942).

In granting the exemptions at issue, the Commission first observed that the Account differs on the one hand from the bank-dominated securities affiliates of the twenties whose abuses inspired § 10[14] and, on the other, from open-end investment companies (mutual funds) not subject to the supervision of the Comptroller. For these reasons, it was appropriate to consider whether a bank-sponsored fund was a type of investment company requiring the standard measure of unaffiliated directors or whether exemptions were justified by its novel characteristics. The Commission concluded that the risks of conflict of interest would be adequately controlled by the provisions of the Investment Company Act still applicable, supplemented by the Comptroller's regulations, and that the exemptions would permit the establishment of a desired new investment medium,

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[14]Securities affiliates were organized by banks to evade the prohibition against investment of bank funds in common stocks. The affiliates, usually closed-end investment companies, often took loans from the sponsor banks, secured by the stock held by the affiliate, and then used the borrowed funds to trade or invest in the bank's stock or in other securities in which the bank had an interest. The affiliates also made loans of investment company funds to the bank. Shareholders of the affiliate and depositors of the bank were both on the losing end of these arrangements. The abuses were detailed in a comprehensive study submitted to Congress by the Commission prior to the adoption of the Glass-Steagall Act. *Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission*, Pt. 1, H.R. Doc. No. 707, 75th Cong., 3d Sess. 94 (1938).

still subject to all the safeguards necessary for the protection of its investors.

The conflict of interest problems created by bank affiliation with investment companies are of a different order when the fund is sponsored by the bank. In the proceedings below, the Commission considered four danger zones, previously cited by former Chairman William L. Cary in testimony before Congress recommending regulation of collective investment funds,[15] and urged by the NASD as reasons for denying the exemptions.

A. *Retention of substantial cash deposits for the Account in the Bank*

The Commission discounted the danger that the Bank might retain an unwarranted portion of the Account's assets in cash in order to earn money for the Bank, stating that the temptation to leave funds uninvested would be contrary to the Account's stated policy of investment for long-term growth of capital and income, and to the Bank's interest in having the fund's assets increase. The interest in increasing the assets in the fund dictates not only that funds already held be invested in growth securities, but also, as we have seen, creates pressure to increase the number of participants. The undisputed fact that the Account will compete with the mutual fund industry can be expected to inhibit retention of its income-producing assets in the form of lopsided cash deposits. There is an important point of convergence between the interests of the Bank directors *qua* commercial bankers and their interest in the success of an investment medium offered as part of the Bank's services, a convergence not present when Bank personnel serve as directors of independent investment companies.

The Comptroller's regulations, moreover, state that funds held in a fiduciary capacity by banks shall not be held un-

[15] *Hearing on Common Trust Funds–Overlapping Responsibility and Conflict in Regulation, Before a Subcommittee of the House Committee on Government Operations* [Hereinafter *Hearing on Common Trust Funds*], 89th Cong., 1st Sess. 11-12 (1963).

invested or undistributed for a period longer than is reasonable for the proper management of the particular account. 12 C.F.R. § 9.10(a). Observance of this regulation is policed through examinations of bank trust departments which occur at least three times in every two years. 12 U.S.C. § 481. The Commission reasonably concluded that the Bank's interest in holding the Account's assets in cash was offset by this combination of the carrot and the stick.

B. *Use of Account investments to shore up Bank loans*

Considered under § 16 of the Glass-Steagall Act was the danger that the Bank might make unsound loans to shore up companies in which it had made investments for the Account. From the standpoint of the Investment Company Act, the risk is that the Bank will make bad investments for the Account to shore up unsound loans. In a letter to the Senate Committee on Banking and Currency, Chairman William McChesney Martin of the Federal Reserve Board explained why this area of risk was not regarded as significant.

> For many years banks have participated in the management of employee-benefit funds and other fiduciary accounts that hold stocks and other securities in an aggregate amount far exceeding those held by the entire mutual fund industry. The examinations conducted by bank supervisory agencies have disclosed practically no such misuse by banks of their investment advisory and management functions. In the case of managing agency funds, an additional safeguard is the prophylactic restrictions and requirements of the Investment Company Act of 1940, particularly publicity of the financial transactions of registered investment companies, which almost inevitably would expose such malfeasance. A further deterrent would be the adverse impact on a collective fund's performance—its comparative financial record—if any of its resources were used to make unprofitable investments; the detrimental effect on sales of participations might outweigh

any benefits the bank could reasonably expect from its breach of fiduciary duty.[16]

In addition to taking note of the Comptroller's supervision of investments, the Commission cited its own supervision of transactions involving a joint arrangement between the Bank acting as a principal and the Account under the insider provision of § 17(d) of the Act, 15 U.S.C. § 80a-17(d),[17] and concluded that the margin for misconduct of this sort was narrow.

C. *Purchase by the Account of securities underwritten by the Bank*

The danger that the Account's funds might be used to promote the Bank's investment banking business is relevant generally to the exemption from § 10(c) and specifically to the exemption from § 10(b)(3). Section 10(b)(3) would have required that a majority of the directors of the Account be unaffiliated with an investment banker. The Bank is in the investment banking business to the extent that it participates in syndicates which underwrite debt securities of governmental authorities.

I concur in the Commission's judgment that there is no basis for concern that the Bank can or will use the Account to further its limited investment banking business. The Account is primarily a stock fund. It is not permitted to purchase any securities from the Bank, 15 U.S.C. § 80a-17(a), and cannot purchase government securities from another member of a syndicate where the Bank participates

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[16]Letter dated December 14, 1967, from William McC. Martin, Jr., Chairman, Federal Reserve Board, to Senate Committee on Banking and Currency, in *Hearings Before the Senate Banking and Currency Committee on Amendment No. 438 to S. 1659*, 90th Cong., 1st Sess. 1223-26 (1968).

[17]Shoring up loans or acquiring banking business in connection with the purchase of stock for the fund may be such a joint transaction. Note, *Commingled Trust Funds and Variable Annuities: Uniform Federal Regulation of Investment Funds Operated by Banks and Insurance Companies*, 82 HARV.L.REV. 435, 451 (1968).

as principal underwriter. 15 U.S.C. § 80a-10(f). The Commission conditioned the exemption by prohibiting purchases from syndicate members even after the Syndicate has terminated but the members hold unsold allotments.

D. *Allocation of brokerage to existing or potential Bank customers*

Former Chairman Cary observed that banks often distribute brokerage to those brokers with whom the Bank has or seeks reciprocal dealings, and that this may be contrary to the best interests of the Account's investors. This is one breed of the "bird-dog" problem presented when bankers direct investment business toward companies whose banking business they desire in return. Such a practice would, of course, depart from the brokerage policy set forth in the prospectus. The Bank's stated objective in placing orders is to obtain the most favorable prices and execution of orders and, secondarily, to deal with brokers and dealers who provide the Bank as investment adviser with supplementary research and statistical information or market quotations.

Reliance on the Bank's representations is not wholly satisfying. Allocation of brokerage for the Bank's benefit is a subtler form of self-dealing than questionable purchases of securities or maintenance of an undue cash balance, and one less amenable to control through disclosure and supervision by the agencies. Nonetheless, brokerage may be improperly distributed in the course of banks' already extensive securities purchases for the account of customers, and it is appropriate to point out that Congress apparently did not consider this threat to be of critical significance when it exempted common trust funds from the Act entirely. See 15 U.S.C. § 80a-3(c)(3).

The Commission's orders do not rest upon a sanguine assumption that there are no conflicts of interest incident to bank-sponsored investment funds, but rather proceed from a showing that the dangers are significantly different from those involved in other types of bank-investment

company affiliations. Because the Bank earns only a regulated fiduciary charge tied to the amount of the Account's assets, the Bank-affiliated directors' interest in attracting more customers coincides with the interests of investors and to some degree counteracts the incentive to hold the fund's assets in the form of commercial deposits. The restrictions upon Bank underwriting and Bank transactions with the Account make it unlikely that the Bank can profit by using the fund to unload or backstop its bad or indifferent investments, a major function of the bank-dominated securities affiliates of the twenties. To the extent that such hazards as improper brokerage allocation remain, the Commission could reasonably have concluded that two independent directors would perform adequately as watchdogs, with the enforcement powers of the Comptroller adding extra teeth.

Finally, the NASD claims that the Commission made an expedient bargain in granting the exemptions in order to head off legislation to exempt bank-sponsored funds from the securities laws. It is true that the Commission's assertion of jurisdiction over such funds generated legislative proposals, along with some friction between agencies of the Executive;[18] but I view the decision differently. Taking due account of the reduced potential for conflicts of interest in bank-sponsored funds and the near-complete coverage of the securities laws, the Commission determined that the supervision of the Comptroller would compensate for the absence of an independent tie-breaker on the Committee of the Account. This was a fair trade.

IV

STANDING

A. *Standing of the Investment Company Institute*

The ICI claims standing to challenge competition from banks on the ground that the Comptroller has authorized a competitive activity specifically prohibited by Congress

[18] *Hearing on Common Trust Funds, supra* n. 15 at 2-3 and 161-64.

in the Glass-Steagall Act. *Cf. Baker, Watts & Co. v. Saxon*, 261 F.Supp. 247 (D.D.C. 1966), *affirmed sub nom. Port of New York Authority v. Baker, Watts & Co.*, 129 U.S. App.D.C. 173, 392 F.2d 497 (1968); *Saxon v. Georgia Assn. of Ins. Agents*, 399 F.2d 1010 (5th Cir. 1968).

As a general rule, competitors lack standing to challenge competiton created or enhanced by governmental action, even if it is illegal, unless they can claim the benefit of an implied or express statutory aid to standing. *Pennsylvania Railroad Co. v. Dillon*, 118 U.S.App.D.C. 257, 335 F.2d 292, *cert. denied sub nom. American S.S. Co. v. United States*, 379 U.S. 945 (1964). The Glass-Steagall Act was not intended by Congress to protect mutual funds from competition from banks, so they do not have standing as intended beneficiaries; and the Act contains no aggrieved party provision. *Contrast Hardin v. Kentucky Utilities*, 390 U.S. 1 (1968); *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). The District Court held, however, that the ICI was an implied, though not an intended beneficiary of the Glass-Steagall Act, and granted it standing to sue as a private attorney general to enforce the separation between commercial banking and securities dealing, despite the absence of an aggrieved party provision to support that role.

We are all agreed that this holding is exceptional, but so is this case. While the majority concludes from the cases that there is no satisfactory authority for standing, I find in those cases no reason to deny standing, and good reason to grant it. First, the authorities for the rule denying competitors standing to challenge unlawful competition are inapposite. Second, the basic justification for entertaining competitors' suits to challenge administrative action as statutory aggrieved parties, intended beneficiaries, or licensees is to vindicate a public interest, and not a private right. The absence of a statutory aid to standing in this case is adventitious, and I would grant appellants standing to assert the public interest without it.

1. *Competitors' standing to challenge unlawful competition without a statutory aid to standing*

Analysis of suits by competitors confirms the Supreme Court's observation that "the various rules of standing applied by federal courts have not been developed in the abstract. Rather, they have been fashioned with specific reference to the status asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 101 (1968). The general rule denying standing to competitors who can claim no statutory aid to standing is derived from two types of cases in which their interest in attacking allegedly unlawful competition has not been found reasonably proportionate to the burden on governmental agencies of defending against such suits. In one class of cases, privately-owned utilities have been denied standing to challenge legislative public power programs. *See, e.g., Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938); *Tennessee Electric Power Co. v. T.V.A.*, 306 U.S. 118 (1933); *Kansas City Power & Light v. McKay*, 98 U.S.App.D.C. 273, 225 F.2d 925, *cert. denied*, 350 U.S. 884 (1955). These cases draw much of their vitality from considerations of separation of powers and the doctrine "that a person may not maintain a suit to enjoin the use of Government funds, even if such use is claimed to be in violation of law." In suits of this nature, "[t]he fact that the plaintiff is suffering an economic detriment from competition assisted by a loan or grant of Government funds, does not give him standing to sue." *Baker, Watts & Co. v. Saxon*, 261 F.Supp. at 249. *Cf. Saxon v. Georgia Assn. of Ins. Agents*, 399 F.2d at 1020-21 (concurring opinion).

There are similarly sound policy reasons why competitive injury does not confer standing to challenge administrative decisions affording some incidental aid to another competitor or group of competitors in an industry. Minor or speculative economic injury is not worth burdening the agencies and the courts with skirmishes among businesses

over comparative advantages resulting from allegedly illegal agency action. *See Pennsylvania Railroad Co. v. Dillon*, 118 U.S.App.D.C. at 262, 335 F.2d at 297.

These, then, are the considerations underlying the many opinions which deny standing with the homily that competition is our economic norm. To acknowledge that cases denying standing to competitors are governed by (1) considerations of separation of powers, and (2) a desire to limit actions against the government, rather than by rigid abstract rules, seems to me only to do justice to the subtleties of standing as an element of justiciability. In suits by competitors, the nature of the claim is plainly relevant to the status of the economic interest asserted as a basis for standing. Here the ICI does not challenge the constitutional propriety of legislation or government spending. It does not ask this court to invoke due process or substantial evidence standards to afford it a remedy for marginal injury from an illegal administrative action. It points out, instead, that national banks operate under a regime of enumerated powers and prohibitions carefully laid down by Congress, and asks us to decide whether the competition authorized by the Comptroller violates specific provisions of the banking laws, one of which carries criminal penalties for bank entry into the securities business. 12 U.S.C. § 378.

In these circumstances, to put the ICI out of court with the incantation that competition is our economic norm is insupportable in law and fact. No case stands for the rule that authorization of novel and prohibited—even criminal—business activity by administrative agencies is part of the rough-and-tumble of a competitive market. And in point of fact, toe-to-toe competition between mutual funds and commercial banks has never been the norm. The Comptroller's action introduces a powerful new element into a market previously closed to commercial banks by the rulings of the Federal Reserve Board, enforcing the same prohibitions now largely committed to the supervision of the Comptroller. This case falls outside the authorities for the

general rule that competitors lack standing to challenge illegal competition.

We are not locked into conventional concepts of unfair competition in assessing a competitor's interest for purposes of standing. *Cf.* Jaffe, *Standing To Secure Judicial Review: Private Actions*, 75 HARV.L.REV. 255, 265-66 (1961). It would not be far-fetched to conclude that competition illegally authorized by an agency which has allegedly ignored statutory prohibitions is unfair. But while there is arguably a private interest meriting protection here, it is plain that the overriding interest in enforcement of the Glass-Steagall Act is a public one. The question is whether the ICI may assert the public interest without a statutory aid to standing.

2. *Competitors' standing to challenge unlawful competition with a statutory aid to standing*

(a) Aggrieved party statutes

Since the decision in *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), competitors have been granted standing to challenge administrative action under statutory aggrieved party provisions despite the fact that the statute does not require that their competitive interests be given weight by the agency. Competitors need not even be members of the industry subject to a specific regulatory statute to sue under it, so long as they can show aggrievement by administrative action pursuant to the statute. *See Clarksburg Publishing Co. v. F.C.C.*, 96 U.S.App.D.C. 211, 225 F.2d 511 (1955); *Philco Corp. v. F.C.C.*, 103 U.S.App. D.C. 278, 257 F.2d 656 (1958), *cert. denied*, 358 U.S. 946 (1959). Competitors whose interests and injuries are not legally protected or even immediately relevant to a regulatory jurisdiction are given standing as private attorneys general to represent the public interest in the proper administration of a regulatory scheme. *Scripps-Howard Radio, Inc. v. F.C.C.*, 316 U.S. 4, 14 (1942); *Associated Industries v. Ickes*, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

(b) Intended beneficiaries

Long before *Sanders*, the Supreme Court had held that competitors have standing to challenge unlawful competition when they can show that a statute was intended to afford some protection to their economic interests. *The Chicago Junction Case*, 264 U.S. 258 (1924). The *Chicago Junction* theory is the only logical support for cases holding that a license, grant, or other property interest makes some competitors more worthy plaintiffs than others. The significance of a license for standing is not its conventional status as a property right but the fact that licensing may indicate a legislative intent to limit competition in a market by regulating entry. Licensees may be intended beneficiaries entitled to rely on a regulatory scheme, with standing to enforce it. *See Frost v. Corporation Comm'n*, 278 U.S. 515 (1929) (Dissenting opinions of Justices Brandeis and Stone).

In *Chicago v. Atchison, Topeka & Santa Fe Ry.*, 357 U.S. 77 (1958), the Supreme Court granted standing to a motor carrier to challenge the operation of a new carrier which had not obtained a permit required by statute on the ground that the first carrier was adversely affected and contended that the competition was prohibited by a valid city ordinance. 357 U.S. at 83. The holding on standing does not even refer to the fact that the plaintiff carrier had a license; the point was that one party was lawfully in business and one allegedly was not. In such cases, the limitation on the number of entrants in a market is not really intended to benefit a licensee, but to assure to the public an adequate level of services from economically viable enterprises. The licensee-plaintiff is vindicating a public interest. His private interest is his reliance on the rules protecting the public.

Since the enactment of aggrieved party provisions giving competitors standing in most regulated industries, the intended beneficiary theory has conferred standing in exceptional cases where there is no express statutory aid to standing, notably in an action against the TVA and in the spate

of suits against the Comptroller. In *Hardin v. Kentucky Utilities*, 390 U.S. 1 (1968), the Supreme Court granted standing to a private utility to adjudicate a dispute over statutory area limitations on the expansion of TVA, a comparatively clear case of market allocation by the legislature.

Competitors in regulated industries have been granted standing as intended beneficiaries of a regulatory scheme where the statute (1) requires equal treatment of competitors (*Chicago Junction*), (2) regulates the number of entrants into a market (*Chicago v. Atchison, Topeka & Santa Fe*), and (3) allocates markets among competitors (*Hardin*). In each case the legislature has concluded that the public interest in an adequate level of efficient services is furthered by some restriction on competition. When private parties sue to enforce those restrictions, they are necessarily asserting a distinct public interest more important than their own.

3. *Competitors' standing to sue the Comptroller*

The banking laws affect competition by keeping banks out of specified business activities, but the limitation of competition in certain markets is a by-product of prohibitions whose overriding purpose is to protect the banks and their depositors' fortunes. Two courts have nonetheless granted standing to a group of insurance agents and a data processing firm to challenge rulings of the Comptroller authorizing banks to enter their bailiwicks on the ground that certain provisions of the banking laws indicate an intent to protect their interests. In *Saxon v. Georgia Assn. of Ins. Agents*, 399 F.2d 1010 (5th Cir. 1968), the majority held that § 92 of the National Bank Act, 12 U.S.C. § 92, permitting banks to act as insurance agents in cities of 5,000 inhabitants or less was intended to protect insurance agents in larger towns from bank competition. But it seems more likely that the sale of insurance was never an activity within the intent of the statutory provision granting banks "all such incidental powers as shall be necessary to carry on the business of banking," 12 U.S.C. § 24(7),

and that the general ban on bank entry into the insurance business was qualified solely for the purpose of strengthening weak banks in small towns. The interest of insurance agents in *retaining* the implied prohibition in larger communities is unrelated to the intent of Congress in enacting it in the first place. 399 F.2d at 1019 (concurring opinion).

Similarly, in *The Wingate Corp. v. Industrial National Bank*, 408 F.2d 1147 (1st Cir. 1969), the plaintiff data processors argued that solicitation by banks of data processing business from the business community at large was not a power incidental to banking, and that recently enacted limitations on the data processing activities of bank service corporations, jointly formed by small banks to enable them to purchase computer equipment, were intended to protect independent data processing companies.[19] The First Circuit accepted this argument, relying heavily upon the fact that the National Society of Public Accountants had proposed the limiting amendment. But the fact that the organized accountants pressed for an explicit limitation does not mean it was designed to protect them. Enterprises that lobby for legislation are not necessarily transformed into intended beneficiaries if it passes.

I agree that the insurance agents and the data processors in these two cases did have standing, but I am not persuaded that the specific provisions relied upon by the courts were intended to create protected classes of competitors any more than the Glass-Steagall Act was intended to benefit mutual funds or investment bankers. *Cf. Baker, Watts & Co. v. Saxon*, 261 F.Supp. 247 (D.D.C. 1966), *aff'd sub nom. Port of New York Authority v. Baker, Watts & Co.*, 119 U.S.App.D.C. 173, 392 F.2d 497 (1968). It is fruitless to look for an intent to protect these businesses from competition from banks in legislation designed to restrict or prohibit bank activities for reasons having nothing to do

[19] *Contra, Assoc. of Data Processing Serv. Organ., Inc. v. Camp*, 406 F.2d 837, *cert. granted*, 37 U.S.L.W. 3489 (June 23, 1969).

with competition. The critical question of congressional intent is this: Did Congress intend to immunize rulings of the Comptroller from judicial review? This is the critical question because substantial immunity is the consequence of denying standing to competitors. They are the only parties likely to challenge the authorization of prohibited bank activity. *Cf. Office of Communication of the United Church of Christ v. F.C.C.*, 123 U.S.App.D.C. 328, 335, 359 F.2d 994, 1001 (1966). The intended beneficiaries of the banking laws, if the class is narrower than the public, are bank customers who have no immediate and compelling interest in litigation to further long-term sound banking.

It is fortuitous that there is no aid to standing for these plaintiffs. If underwriters, insurance agents, data processors, and securities dealers are right that banks are prohibited by law from entering their businesses, Congress would never have foreseen that administrative rulings under the banking laws would substantially affect their economic interests. Judging from the purpose and pattern of the banking laws, the question of aggrieved non-bank competitors never came up.

This conclusion finds support in the fact that when Congress anticipated competition problems, it dealt with them in specific terms, notably in provisions of the banking laws equalizing the legal conditions of competition between state and national banks. In dozens of cases, state banks, and recently a state banking agency have had standing to challenge the authorization of new branches of national banks in violation of the st tutory limitation of national bank branching to areas where state branches are permitted. 12 U.S.C. § 36(c). *See, e.g., Whitney Nat. Bank v. Bank of New Orleans & Trust Co.*, 116 U.S.App.D.C. 285, 323 F.2d 290 (1963), *rev'd on other grounds*, 379 U.S. 411 (1965); *Nuesse v. Camp*, 128 U.S.App.D.C. 172, 385 F.2d 694 (1967).[20] Thus, under the usual rules of standing, a state

[20]Section 92a of the Federal Reserve Act, 12 U.S.C. § 92a, authorizing national banks to act in any other fiduciary capacity open to

bank can enjoin illegal branching by national banks, but there is no party who can sue to enforce the separation between commercial banking and the securities business. Given the relative triviality of the threat to the banking system posed by outlaw branch banks as compared to the menace of illegal securities dealing, this result is too bizarre to have been intended by Congress.

Disappointed license applicants can call the Federal Communications Commission to account for its decisions in the name of the public. Regulated carriers and state banks may challenge unlawful competition because courts have inferred some protection to their interests from a regulatory scheme. In both cases, competitors' suits are furthering the public interest at stake in the rules. All that is missing in this case is a "logical nexus" between the competitive interest of the mutual fund industry and the aims of the banking laws. *Flast v. Cohen*, 392 U.S. 83, 102 (1968). It is missing because Congress had more important interests in mind.

Principles of standing in competitors' suits have operated as rules of thumb to sort out proper plaintiffs and legal issues of competition deemed appropriate for judicial resolution. Both are present here. It is not disputed that the members of the ICI are aggrieved by the Comptroller's ruling. Bank-sponsored diversified investment funds open to $10,000 customers will compete for the cream of the market now cornered by the mutual funds. The ICI presents a question of statutory construction to define the boundaries of official authority, a type of question well within the traditional competence of courts of law. It is the only party likely to assert the public interest in observance of the banking laws by the agency responsible for enforcing them. In the exceptional circumstances of this case, I

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state banks in the locality, discussed *supra* pp. 8-9, indicates a similar concern for equalizing the ground rules of competition between state and national banks.

would grant the ICI standing to vindicate the public interest despite the absence of a statutory aid to standing.[21]

B. *Standing of the National Association of Securities Dealers*

The NASD claims standing to seek judicial review under § 80a-42(a) of the Investment Company Act, which accords a right of review to "[a]ny person or party aggrieved by an order issued by the Commission . . . ." 15 U.S.C. § 80a-42(a). It relies principally on the case of *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), to support its standing to sue as a private attorney general to vindicate the

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[21] The commentators agree that a conventional "legally protected interest" or statutory aid to standing should not be required in all cases. Professor Davis has long maintained that § 10 of the Administrative Procedure Act, 5 U.S.C. § 701 (Supp. II 1965-66), accords a right of review to any person aggrieved in fact by administrative action. 3 K. C. Davis, ADMINISTRATIVE LAW TREATISE § 22.02 (1958); *Standing: Taxpayers and Others*, 35 CHI.L.REV. 601, 619 (1968). Aggrievement in fact is all that is needed to create a case or controversy in the constitutional sense. There is some support for Professor Davis' interpretation in the legislative history of § 10, but most courts, including this circuit, have rejected it. *Kansas City Power & Light v. McKay*, 96 U.S.App.D.C. 273, 225 F.2d 924, *cert. denied*, 350 U.S. 884 (1955).

Professor Jaffe views the private attorney general theory grafted on to aggrieved party provisions as a variant of the common law public action, rooted in English and American state law. If a party is suing as a private prosecutor, Professor Jaffe regards his individual interest as irrelevant, but in such cases, "judicial discretion in terms of the size, urgency, and clarity of the issue at stake" should be exercised in the decision to take jurisdiction. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV.L.REV at 286-87.

The theory that standing may be accorded as a matter of discretion when the plaintiff is aggrieved in fact combines the two commentators' approaches. *Curran v. Clifford*, No. 21040 (D.C. Cir., decided Dec. 27, 1968), *opinion vacated, petition for rehearing en banc granted* April 3, 1969. These approaches would support a finding of standing to challenge administrative action where (1) the plaintiff is aggrieved, or (2) the question presented is important, urgent and susceptible of judicial resolution, or (3) both conditions are present.

public interest in the proper enforcement of the Investment Company Act. This standing issue is settled by *Sanders*. There is no requirement that a plaintiff establish a legally protected private interest to sue under "party aggrieved" statutes. *Office of Communication of United Church of Christ v. F.C.C.*, 123 U.S.App.D.C. at 335, 359 F.2d at 1001. The only question is whether the NASD is aggrieved by the Commission's orders granting the exemptions from the Act to the Bank.

The NASD represents about 3,700 registered brokers or securities dealers. Most of its members sell shares in mutual funds to investors and are compensated by sales commissions from the "load" charged by the funds. The Bank's commingled investment Account and similar bank-sponsored funds sure to follow[22] are an addition to the group of "no-load" funds whose shares are not sold at a commission by NASD members. No one denies that bank-sponsored collective investment funds will provide substantial competition to both "load" and "no-load" mutual funds. Limitation of sale of participations to customers with a minimum of $10,000 to invest does not narrow the area of competitive overlap enough to make probable injury insubstantial. Surveys indicate that individual sales of $10,000 or more have accounted for about half the mutual fund industry's total dollar sales.[23] NASD members stand to lose commissions earned from the cream of the business. This is enough to show that they are aggrieved parties under § 80a-42(a).

It is clear, moreover, that the NASD is aggrieved as a result of the Commission's orders. Analysis of the legal prob-

[22]Speaking of its exemption decision, the Commission has stated: "A pattern has thus been set which other banks may follow if they see fit." *Hearings on S. 2704 Before a Subcommittee of the Senate Committee on Banking and Currency*, 89th Cong., 2d Sess. 138. At the hearings, the American Bankers Association and individual banks demonstrated great interest in commingled accounts. *Ibid.* at 31-61.

[23]See testimony of an industry representative in *Hearings on S. 2704 Before a Subcommittee of the House Committee on Banking and Currency, supra* n. 22 at 96.

lems in establishing the Account in conformity with the banking laws confirms the Bank's concession that without the exemptions, it would be "effectively precluded" from operating the Ac ount. Both conditions of standing to sue under the aggrieved party provision are met.

For these reasons, I join in the decision of the court.

BURGER, *Circuit Judge*, concurring:* Although I am unable to join in the rationale underlying Judge Bazelon's basis for standing of Appellees, nonetheless I am prepared to agree with the result in order to make a majority holding for review of the merits of a subject of such importance. I do so in order to reach consideration of the merits for such aid as some examination at our level may be useful to further judicial review.

(1)

As I see it, there are three generally accepted theories of standing which guide the courts in ascertaining whether a plaintiff is the appropriate "party seeking to get his complaint before a federal court." *Flast v. Cohen*, 392 U.S. 83, 99 (1968). The first emerges from those cases involving a statutorily defined basis for standing. *See, e.g., Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). The second evolves from those cases where the plaintiff holds a public license, grant, or recognized property interest which supports his assertion of litigable rights. *See, e.g., Frost v. Corporation Com'n.*, 278 U.S. 515 (1929); *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 116 U.S. App. D.C. 285, 323 F.2d 290 (1963), *rev'd on other grounds*, 379 U.S. 411 (1965). A third theory of standing centers around a finding of intended "statutory protection" which has been bestowed upon the plaintiff

*Consistent with the views herein expressed which are directed to *First Nat'l City Bank v. I.C.I.*, No. 21,661, I concur in Judge Bazelon's finding of standing as respects *NASD v. SEC*, No. 20,164 and join in the disposition on the merits in that case.

thereby entitling him to sue in order to preserve the interests which the statutory scheme has found to be worthy of protection. This third concept of standing supported the development of a less easily identifiable strain of decisions focusing on a theory of "unlawful competition."

The "unlawful competition" theory as a basis for standing would seem to have two distinct definitional interpretations: (1) "to compete in any manner, whether legal or illegal techniques are utilized, is 'unlawful competition'"; (2) "to engage in non-prohibited competition by utilizing techniques or engaging in activities which are in themself illegal is 'unlawful competition'". Under the former interpretation, either no one may enter the competition in a given kind or area of endeavor or the particular party seeking to enter the competition has been prohibited from doing so in order to protect those parties already pursuing the activity under some grant, franchise or license. Under the latter interpretation, competition per se is not proscribed but the very conduct which constitutes the competition is in itself illegal. In my view, the first interpretation is a valid one which necessarily emerges from the recognized desire to "protect" extant interests and can properly form the basis for a claim of standing. The second finds no support in a close analysis of the myriad cases reviewing the prerequisites to standing, is a misinterpretation of the conceptual genesis of the theory of unlawful competition, and cannot support a claim of standing.

An illustration of this can be seen in the distinction drawn in the recent *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 5-6 (1968) case. There, the Supreme Court explained that:

> [T]he economic injury which results from *lawful competition* cannot, in and of itself, confer standing on the injured business to question the *legality* of any aspect of its competitor's *operations* (emphasis added).

The reasonable corollary of this proposition would be that a party could question the legality of its competitor's operations if, independently, it could demonstrate that the com-

petition per se was "unlawful." In its subsequent analysis,[1] the Court made clear that by utilizing the term "unlawful competition" it meant to preserve the operative distinction between an evaluation of the lawfulness of the competition itself and an evaluation of the legality of the particular conduct which produces the competition.[2]

To resolve the standing question the Court did not find it necessary to inquire into the legality or illegality of the implementing operations which the Tennessee Valley Authority was to utilize to enter the market for selling electricity in the areas in question.[3] All that was necessary was a find-

[1] In the language following the above-quoted statement, the Court continued:

> But competitive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury. In contrast, it has been the rule at least since the *Chicago Junction Case*, 264 U.S. 258 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision.

390 U.S. at 6.

[2] This court recently recognized this distinction in Pennsylvania R.R. Co. v. Dillon, 118 U.S. App. D.C. 257, 259-60, 335 F.2d 292, 294-95, *cert. denied sub nom.*, American Hawaiian S.S. Co. v. Dillon, 379 U.S. 945 (1964):

> "Legal wrong," as we have only recently noted, is the invasion of a legally protected right. See Gonzalez v. Freeman, *supra*, 117 U.S. App. D.C. at 186 n.6, 334 F.2d at 576 n. 6. Thus, in order to make out a claim of "legal wrong" under Administrative Procedure Act § 10(a), appellants must assert some legally protected right to be free of the competition . . . . This court has very recently spoken on this aspect of standing. When "Congress has not given them any such standing by express or implied provision of statute * * *, mere economic competition made possible by governmental action (even if allegedly illegal) does not give standing to sue in the courts to restrain such action. [citations omitted] For purposes of standing in this case, the sufficiency of appellants' allegation of "legal wrong" thus depend upon congressional intent to bestow upon them a legal right to protection from such competition.

[3] Significantly, the Court finally concluded that TVA "could . . . properly make its low-cost power available to consumers in this . . .

ing that "one of the primary purposes of the area limitations in § 15d of the [Tennessee Valley Authority Act of 1933 as amended] was to protect private utilities from TVA competition." *Id.* at 6. An area limitation, of course, lends itself to ready interpretation, hence competition per se by TVA would be "unlawful" if TVA had in fact encroached upon the market area which had been reserved for the local utility companies and from which TVA's entry had been prohibited. Because Kentucky Utilities Co. was a member of the class so meant to be protected, it had standing to litigate to obtain an adjudication of its substantive rights under the protective statutory scheme, and "[n]o explicit statutory provision [was] necessary to confer standing." *Id.* at 7 (footnote omitted).

The rationale underlying this finding of standing is that Congress affirmatively intended Kentucky Utilities to be protected from TVA competition. In essence, it was a clearly identifiable beneficiary of a statutory grant of protection, and as such, it was entitled to sue to protect the rights conferred. Whether TVA's operations which led to the competition were in themselves legal or illegal was irrelevant to the determination of Kentucky Utilities' standing.

In addition to these three categories of standing cases, some hybrid variations—some of which are valid, others not—have emerged. They include: (1) the *Flast v. Cohen*, *supra*, provision for taxpayer challenges of federal expenditures allegedly in violation of specific constitutional limitations; (2) the unique application of the "consumer aggrievement" concept articulated in *Office of Communication of United Church of Christ v. FCC*, 123 U.S. App. D.C. 328, 359 F.2d 994 (1966), pursuant to the "person aggrieved" provision of the Federal Communications Act, 47 U.S.C. 309(d) (1964); (3) the discretionary standing theory broached in *Curran v. Clifford*, No. 21,040 (D.C. Cir., Dec.

area . . . ." 390 U.S. at 5. Therefore, the Court's resolution of the standing issue can not be evaluated as a rationalization prompted by its determination that Kentucky Utilities Co.'s substantive rights had been violated.

27, 1968), *opinion vacated, petition for rehearing en banc granted*, No. 21,040 (D.C. Cir., April 3, 1969); (4) the concept that "aggrievement in fact" is sufficient to give a party standing to challenge agency action under § 10 of the Administrative Procedure Act; (5) the improper utilization of the "unlawful competition" theory discussed *supra* and employed by some courts which have granted standing in cases involving recent promulgations by the Comptroller of the Currency.[4]

(2)

Against this background we should examine Appellees' claim of standing in the present litigation. As set forth in the preceding opinion, Appellee-Institute is a national association representing 177 open-end management investment companies commonly designated as "mutual funds" and the 88 investment advisers and 78 principal underwriters of these funds. The mutual fund members of the Institute represent 94 percent of all such companies in the United States. The Institute membership also includes several investment advisers and principal underwriters of individual mutual funds which are individual Appellees in this suit.

The major basis for Appellees' claim of standing to challenge the Comptroller's regulations is that the entry of the national banks into the so-called "mutual fund industry" would constitute "unlawful competition" which Appellees as representatives of the industry may challenge.[5] However,

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[4]For an extensive collection of the recent cases involving "unlawful competition" as a theory for challenging activity authorized by the Comptroller see Saxon v. Georgia Assoc. of Independent Ins. Agents, Inc., 399 F.2d 1010, 1017 n.6 (5th Cir. 1968). *See also* Judge Bazelon's opinion at pp. 30-34.

[5]Appellees also assert that § 702(a) (Supp. II, 1967), embodies an independent and self-sufficient statutory basis for standing. I do not feel that the APA was meant to arrest the development of the law of standing as of the date of its passage:

> [W]e would certainly be prepared to hold in an appropriate case that one who complains of administrative action may find

an analysis of the facts of this controversy illustrates Appellees' reliance on an incorrect interpretation of the concept of "unlawful competition." To perceive the faulty basis of the claims of Appellees, their precise contentions must be studied.

> Appellees are complaining of unauthorized administrative action creating a form of competition specifically prohibited by Congress in the Glass-Steagall Act. The challenged regulations authorize banks to engage in unlawful competition, permitting them to enter the mutual fund business and engage in *issuing, selling, distributing* and *underwriting securities* in violation of Sections 16, 20, 21 and 32 of the Glass-Steagall Act. Appellees are not merely challenging a program of governmental assistance, financial or otherwise, to lawful competitors *whose competitive activities* have been specifically authorized by Congress.

Brief for Appellees 66 (emphasis added).

Appellees then go on with sweeping contentions "that competitors have the right to challenge new competition, authorized by administrative action, which has been prohibited by statute."

* * *

> Furthermore, there is *no justification* for the gloss which Appellants attempt to put on *Hardin requiring a specific and express Congressional intent to protect particular plaintiffs in order to confer standing on them* to challenge regulations which create unlawful competition. The well-established rule, in this Court, the Supreme Court, and other courts, is directly to the contrary. *Where the effect of the statutory prohibition*

> a remedy under the Act beyond the strict scope of judicial review recognized prior to its adoption ... .

Kansas City Power & Light Co. v. McKay, 96 U.S. App. D.C. 273, 282, 225 F.2d 924, 933, *cert. denied*, 350 U.S. 884 (1955). Nevertheless, although the review provisions of the APA were not meant to retard the judicial development and adaptation of the law of standing, it does not establish an independent right to review absent judicially articulated notions of "legal wrong" of "adversely affected or aggrieved . . . within the meaning of any relevant statute." *See* Pennsylvania R.R. Co. v. Dillon, *supra* note 2.

> *is to bar competition*, those subject to such illegal competition created by administrative regulation have the standing to challenge the regulation.

Brief for Appellees 66, 67, 73 (emphasis added).

Appellees have thus sought to shift the focus to the activity of the Bank and its alleged violation of the strictures of the Glass-Steagall Act; their burden is to establish their own status as intended statutory beneficiaries of a freedom from competition by national banks.

In a recent decision denying standing in a suit brought by the Association of Data Processing Service Organizations and Data Systems, Inc.[6] challenging allegedly improper national bank entrance into the data processing business, the Eighth Circuit made some cogent observations:

> Much of the confusion on standing seems to arise from the emphasis upon the issues to be adjudicated or upon the possible merits of the substantive claim rather than upon an examination of the status of the complaining plaintiff. *Whether or not a defendant is alleged to be engaged in illegal competition cannot by itself* determine a plaintiff's standing to complain. ... The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.
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> * * *
>
> [I]t seems clear that an allegation of "illegal competition" is not the balancing determinant of a plaintiff's standing. The primary search must rest on whether the plaintiff's status is one which enjoys a private interest entitled to protection or one which the law recognizes to be of such legal significance to allow a party to act as a public representative for a public interest.

Association of Data Processing Service Organizations, Inc. v. Camp, No. 19,218 (8th Cir., Feb. 6, 1969) (citations omitted) (emphasis added).

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[6]Data Systems Inc. is a Minnesota corporation engaged in the data processing business. Association of Data Processing Organizations is an incorporated association domiciled in Pennsylvania whose members perform data processing services throughout the United States.

That Court found that the plaintiffs were "competing in a non-regulatory field of free competition," they were not members of any class "designedly protected by statute," and they possessed no legal interest "recognized at law." *Id.* at 10. Accordingly, they had no standing to challenge the new rulings by the Comptroller which allowed the bank to offer these new services.

As previously indicated, the Glass-Steagall Act does not contain the familiar provisions which constitute an aid to standing in terms of allowing a "person aggrieved" to challenge administrative decisions or promulgations made pursuant to the Act. Nor can Appellees validly assert any "license, grant, or recognized property interest" entitling them to standing. It is equally clear that giving even the broadest reading of the legislative history embellishing the Act will not support the conclusion that Congress meant to bestow upon Appellees any protection from competitive injury.[7] With these bases of standing foreclosed, Appellees necessarily turn to the inaccurate definition of "unlawful competition" which I find to be without support in an analysis of the "competition" cases.

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[7] *See* Judge Bazelon's opinion at p. 25. The thrust of the legislation, and the concern of the drafters, was to protect the banking public through the maintenance of a sound national banking system. Senator Bulkley, one of the managers of the bill, made it explicit in his remarks that the bill was not focused on protecting the investing public, much less the securities industry:

> [T]he purpose of this bill does not extend to safeguarding purchasers of securities as such. The purpose of this bill is to improve the operation of the Federal reserve system and the banks which are members of it. The object of the inhibitions which I am discussing here is not primarily to protect the investing public, although that is a worthy purpose, but our field is to protect the operations of the banking system itself, and to protect the depositors and customers of the banks so that they shall have the service from national and State member banks which they are entitled to expect.

75 CONG. REC. 9913-14 (1932). *See also* Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 266 (1961).

For the most part the cases relied on by Appellees are readily distinguishable. In *American Trucking Ass'n.*, 364 U.S. 1 (1960), the Court found a statutory purpose to protect "all modes of transportation" and the complaining party had the benefit of a specific "party in interest" aid to standing. Interstate Commerce Act, 49 U.S.C. § 305 (g). *Chicago v. Atchison, T. & S.F. Ry.*, 357 U.S. 77 (1958), involved a plaintiff which held a license, thereby entitling it to oppose another carrier's operation without obtaining a license. In *Frost, supra,* the Court found that a cotton gin licensee had a "property right" and could challenge the invasion of this right by another without a valid license. In *Whitney Nat'l. Bank, supra,* the Court allowed a state bank to challenge the Comptroller's authorization of new branch banks from national bank competition. The *Georgia Insurance Ass'n.* case, *supra,* involved a provision of the Glass-Steagall Act which evidenced an affirmative legislative intent to protect local insurance agents from the competition of national banks.

Some of the language in *Port of New York Authority, supra,* is more troublesome. There, a group of investment bankers challenged the Comptroller's authority under Glass-Steagall to permit national banks to distribute revenue bonds not backed by the taxing power of the public body issuing the bonds. In acknowledging standing for the investment bankers to pursue their challenge, the District Court explained:

> While no one may maintain a suit to restrain lawful competition merely because he is suffering an economic detriment, nevertheless, a person has a standing to complain against *illegal competition*, or *specifically, against competition on the part of a person who lacks the legal right or power to pursue the competitive activities.* In this respect this action is precisely parallel to cases in which a state bank has been permitted to maintain suit to restrain the Comptroller of the Currency from granting permission to a national bank to establish a branch that would compete with the plaintiff.

Id. at 248 (emphasis added).

It seems to me that the District Court gave undue weight to the claim of unlawful competition and in effect equated it with competition created by illegal *activities*. This made it possible to rely on the "branch banking cases" which are not really applicable, since those cases turn on the provisions of Glass-Steagall which limit branch banking of national banks specifically in order to protect state banks from the unrestricted competition of national banks. *See, Pennsylvania R.R. Co. v. Dillon*, 118 U.S. App. D.C. 257, 335 F.2d 292, *cert. denied sub nom., American Hawaiian S.S. Co. v. Dillon*, 379 U.S. 945 (1964); *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 116 U.S. App. D.C. 285, 323 F.2d 290 (1963), *rev'd on other grounds*, 379 U.S. 411 (1965).[8]

Appellees here pursue their associational livelihood in a securities marketing industry which thrives on competition in the quest for the investment dollar. The entry of the national bank commingled investment accounts into this competition admittedly adds a whole new category of competitors but it is fundamentally not different from the situation which arises, for example, when "gas stations" sell candy bars, soft drinks and other staples for which travellers have need. Nevertheless, before Appellees may sue to prevent bank competition which affects their private financial interests, they must establish that the Glass-Steagall Act contemplated that they were to be protected from this competition in their pursuits. Even assuming that the competing activity of the Appellant Bank may be otherwise violative of a provision of the Act, I can find no indication

[8] In *Pennsylvania R.R. Co. v. Dillon*, we specifically noted this critical distinction:

> Appellants' reliance on *Whitney* [citation omitted] is also misplaced. There, this court held that certain state banks had standing to attempt to enjoin the Comptroller of the Currency from issuing to a national bank a Certificate of Authority allegedly in violation of federal banking statutes. The court found that federal statutes had guaranteed that state banks would be free of certain competition from national banks.

118 U.S. App. D.C. at 262 n.6, 335 F.2d at 297 n.6.

that the Act intended to afford protection to securities dealers generally. My position therefore is one of reservation amounting to virtual disbelief in any standing in Appellees.

(3)

Persuasive arguments can be advanced that the pressure for someone with standing to challenge conduct in matters of large public interest is so great that irreconcilable abstractions and distortions have emerged to satisfy what are thought to be the needs. Quite often courts pursued a "bootstrap" or circular logic by initially analyzing the merits, in order that a finding of standing to challenge actions seems more palatable because the court has already found a possible encroachment of "rights" which it desires to review. To evaluate standing solely or even primarily on such visceral reactions does violence to the judicially created concepts of standing:

> The fundamental aspect of standing is that it focuses *on the party* seeking to get his complaint before a federal court *and not on the issues* he wishes to have adjudicated.

Flast, supra at 99 (emphasis added).[9]

Evaluating Appellees' qualifications as prospective litigants on behalf of their own private economic interests and the public's interests, it becomes evident that they are indeed adverse both as respects their actual prosecution of this litigation and in regard to their fundamental challenge to the Comptroller's authority to allow the national banks to engage in this type of securities activity. Their financial inter-

[9]The *Flast* Court spoke in terms of the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." However, I suggest that the thrust of the "constitutional" reference was in relation to the ability to challenge the particular action—federal expenditures in sensitive constitutional areas—there involved and was not intended to retard the flexibility of sound concepts of standing when the plaintiff's assertions focus on non-constitutional violations in areas of administrative activity.

est in these proceedings has been examined in the preceding opinion, and when this is coupled with authoritative prognostications of impending financial harm to their interests if the Comptroller's regulations are allowed to stand,[10] it is obvious that there exists one cogent qualification of a challenger in the reasonable probability of factual aggrievement sufficient to insure the spirited adverseness necessary to judicial resolutions.

With this element satisfied, on this record the alternative to a grant of Appellees' claim to standing would be to effectively frustrate any challenge to the regulations in question.

(4)

Because of the factors discussed heretofore I am unable to set aside my grave doubts as to Appellees' standing to institute and maintain these suits. However, in the uncertain state of the law as to standing, there is something to be said on both sides of that question. I therefore resolve my doubts in favor of the Appellees and concur in the result of that portion of the foregoing opinion which holds that the Appellees have standing. I am influenced substantially, as I indicated at the outset, by the need for judicial examination of the important questions raised.

The record before us reflects that the Federal Reserve Board and other government agencies involved gave careful and comprehensive study to all aspects of this problem before taking the actions challenged by the mutual fund industry. Our review function is narrow and limited; it does not include the power to decide whether the public will be better served by one or the other modes of investing funds so as to achieve diversification, yield, safety or low cost. All that is the primary responsibility of the special regulatory bodies established by Congress for that purpose. On the

[10]Indeed, the Comptroller himself predicted that in the next decade commercial banks operating under these regulations "might capture as much as two billion dollars of mutual fund business." *Hearings on H.R. 8499, 9410 before the Commerce and Finance Subcommittee of the House Committee on Interstate and Foreign Commerce*, 88 Cong. 2d Sess. p.26 (1964).

face of the record there is, of course, nothing very startling about the decisions of the Comptroller, the Commission or of the Federal Reserve Board. In one form or another banks have been holding, managing and investing funds for customers for a long time. Indeed, when one considers the historical background it could be reasonably argued by banks that "investment trusts" and more recently "mutual funds" have invaded their domain. However, such arguments are of a kind which are for the regulatory agencies.

Here the Comptroller of the Currency, after study, has decided that the commingled managing agency account is a function which is authorized by law for banks and is in the public interest; the Securities and Exchange Commission and the Federal Reserve Board have approved. Other state and federal regulatory bodies are in accord. The regulatory bodies charged by Congress with these large responsibilities have construed the grant of power and with their accumulated expert experience have decided these issues. Their decisions are entitled to substantial deference and on this record I see no basis for disturbing their conclusions.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted in printing]

ORDER

(Filed August 15, 1969)

On consideration of appellees' petition for rehearing, it is ORDERED by the Court that appellees' aforesaid petition is denied.

Per Curiam.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

[Title omitted in printing]

[ORDER]

March 23, 1970. The petition for a writ of certiorari is granted. The case is placed on the summary calendar and set for argument immediately following No. 835. The Chief Justice took no part in the consideration or decision of this petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

INVESTMENT COMPANY INSTITUTE ET AL., *Petitioners,*

v.

WILLIAM B. CAMP, Comptroller of the Currency;
FIRST NATIONAL CITY BANK, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners—Investment Company Institute, an association of mutual funds and their investment advisors and principal underwriters, and a number of individual Institute members—pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-captioned case.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It is reprinted as Appendix A hereto, pp. 1a to 50a, *infra*. The opinion of the District Court

for the District of Columbia is reported at 274 F. Supp. 624 (1967) and is reprinted as Appendix B hereto, pp. 51a to 94a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1969. (Appendix C, p. 94a, *infra*). A timely Petition for Rehearing was denied on August 15, 1969. (Appendix D, p. 95a, *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1964). The basis of jurisdiction in the District Court was 28 U.S.C. § 1331 (1964).

QUESTION PRESENTED

Whether Regulation 9 of the Comptroller of the Currency, and his specific rulings thereunder authorizing national banks to sponsor and promote collective investment funds, which are functionally indistinguishable from mutual funds, (a) violate those provisions of the Glass-Steagall Act which were designed to separate commercial banking from the securities business and to prohibit commercial banks from issuing, selling, distributing, and underwriting securities, and (b) exceed the permissible scope of the bona fide fiduciary activities of national banks which the Comptroller is empowered to authorize under Section 92a, 12 U.S.C.

STATUTES AND REGULATION INVOLVED

The statutory provisions involved, 12 U.S.C. §§ 24, 377, 378, 78 (1964) (hereinafter designated as "the Glass-Steagall Act") and 12 U.S.C. § 92a (1964) are set forth in Appendix E, pp. 95a to 98a, *infra*. Also set forth in Appendix E are the pertinent parts of the

Comptroller's Regulation 9, 12 C.F.R. § 9 (1967), pp. 98a to 106a, *infra*.

STATEMENT

Petitioner Investment Company Institute (hereinafter the "Institute") is a national association representing 177 open-end management investment companies (popularly known as "mutual funds") and their 88 investment advisers and 78 principal underwriters. The mutual fund members of the Institute have assets of more than $36 billion, representing about 94 percent of the assets of all such companies in the United States; they have approximately 3.5 million shareholders.[1] In addition, Petitioners include several investment advisers and principal underwriters of individual mutual funds, all of whom are members of the Institute.[2]

Since the days of the Great Depression, the securities business in which Institute members engage has been kept completely independent and apart from the commercial banking business. In order to prevent a recurrence of the disastrous results which attended the intermingling of commercial and investment banking activities prior to the Depression, in 1933 Congress passed the Glass-Steagall Act to erect a wall of separation between commercial banking and the securities

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[1] These figures are based on the record of this case when filed in April, 1966. Current data indicates that the Institute represents 274 mutual funds, 127 investment advisers and 109 principal underwriters. The assets of the mutual fund members of the Institute total more than $50 billion and these funds have approximately 5 million shareholders.

[2] These individual Petitioners are Investors Diversified Services, Inc.; Investors Management Company, Inc.; Hugh W. Long & Company, Inc.; Wellington Management Company; and Wellington Company, Inc.

business.[3] This case involves an attempt by the Comptroller of the Currency to breach that wall, for the first time, by authorizing national banks to reenter the securities business through the promotion of commingled investment funds and the issuance and sale of securities in these funds which are functionally indistinguishable from mutual fund shares.[4]

Although commercial banks have in the past made repeated efforts to expand into the mutual fund business under the guise of exercising their traditional fiduciary powers, for more than two decades the Federal Reserve Board (hereinafter the "Board")—which until 1962 had regulatory responsibility over the fiduciary activities of national banks—consistently rejected such efforts. The Board repeatedly held that a bank's promotion of a common trust fund as a speculative investment device was not a bona fide fiduciary activity.[5]

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[3] "The Banking Act of 1933, enacted on June 16, 1933, was promulgated to *effect a complete severance of the commercial and investment banking functions* and to eradicate many of the abuses disclosed at the hearings before the Senate subcommittee." S. Rep. No. 1455 on "Stock Exchange Practices," 73rd Cong., 2d Sess. (1934), p. 185 (emphasis supplied).

[4] Former Comptroller James J. Saxon promulgated the regulations in question here. He was succeeded by Respondent William B. Camp.

[5] The Board has always made it perfectly clear that a bank's authority to operate a common trust fund for bona fide fiduciary purposes, i.e., a commingled fund made up of assets held by the bank in its traditional role as "trustee, executor, administrator, or guardian," did not extend to the operation of such funds as speculative investment devices. See, Section 584, Internal Revenue Code. The Board warned against the merchandising of such funds as speculative investments, because the use of aggressive advertising might turn a common trust fund into a mutual fund device. 42 Fed. Reserve Bull. 228 (1956). See *infra*, p. 27.

However, in 1962, Congress transferred regulatory responsibility over fiduciary activities of national banks from the Board to the Comptroller. Public Law 87-722, 76 Stat. 668 (1962), codified at 12 U.S.C. § 92a (1964). In doing so, Congress made clear that it intended no change in the existing statutory law concerning the permissible fiduciary activities of national banks.[6]

Nevertheless, promptly after receiving these responsibilities, the Comptroller promulgated regulations authorizing national banks with fiduciary powers to maintain collective investment funds as investment media and to offer shares in such funds to the public.[7] 12 C.F.R. § 9.18, amended on February 5, 1964,

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[6] S. Rep. No. 2039, 87th Cong., 2d Sess. (1962), p. 1: "No change would be made from the substantive provisions of section 11(k) other than the transfer of authority, *so that there is no alteration of existing law regarding national banks acting in fiduciary capacities.*" (Emphasis supplied.)

[7] In this same period, the Comptroller also promulgated a number of other controversial regulations permitting commercial banks to undertake additional non-banking activities. A number of these regulations have been declared unlawful. See, *Baker, Watts & Co.* v. *Saxon*, 261 F.Supp. 247 (D.D.C. 1966), *aff'd sub nom. Port of New York Authority* v. *Baker, Watts & Co.*, 129 U.S. App. D.C. 173, 392 F.2d 497 (1968); *Georgia Ass'n of Independent Ins. Agents, Inc.* v. *Saxon*, 268 F.Supp. 236 (N.D. Ga. 1967), *aff'd*, 399 F.2d 1010 (5th Cir. 1968). The Comptroller neither appealed the adverse District Court decision in the former case nor filed a petition for certiorari in the latter. Several other cases challenging the Comptroller's new regulations are still in litigation. *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 406 F.2d 837 (8th Cir. 1969), *cert. granted*, 37 U.S.L.W. 3493, June 23, 1969; *Arnold Tours, Inc.* v. *Camp*, 408 F.2d 1147 (1st Cir. 1969), *cert. petition filed*, June 11, 1969, Supreme Court Doc. No. 128. The latter case was consolidated for decision in the Court of Appeals with two other cases in which petitions for certiorari have been filed individually. *Wingate Corp.* v. *Industrial National Bank*, *cert. petition filed*, May 19, 1969, Supreme Court Doc. No. 129; *Wingate Corp.* v. *Camp*, *cert. petition filed*, June 11, 1969, Supreme Court Doc. No. 225.

29 Fed. Reg. 1719. Pursuant to these regulations, Respondent First National City Bank (hereinafter the "Bank") submitted and had approved a plan for the operation of a collective investment fund, the so-called "Commingled Investment Account" (hereinafter the "Account").[8]

Petitioners brought this suit against the Comptroller to have the challenged portions of the Regulation and the specific rulings thereunder declared unlawful and further action thereunder enjoined. The complaint charged that the Comptroller acted beyond his statutory power in authorizing collective investment funds in that Regulation 9:

> (a) permits bank activity which violates four specific prohibitions of the Glass-Steagall Act which prohibit commercial banks from "issuing, underwriting, selling or distributing . . . securities."; and
>
> (b) authorized banks to engage in securities activities which were clearly outside the bona fide fiduciary activities permitted national banks by Section 92a of the National Banking Act.[9]

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[8] In addition, the Account registered with the Securities and Exchange Commission as an investment company under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 (1964); participations in the Account are registered as securities under the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (1964). Other national banks may establish collective investment funds similar to the Account without obtaining specific authorization from the Comptroller. Joint Appendix (hereafter "J.A."), p. 107. The Joint Appendix filed in the Court of Appeals is included in the designated record here.

[9] Pub. L. No. 87-722, 76 Stat. 668 (1962), 12 U.S.C. § 92a (1964). The provisions of the Glass-Steagall Act to which reference is made are §§ 16, 20, 21, 32, 48 Stat. 162 *et seq.* (1933), as amended, 12 U.S.C. §§ 24, 377, 378, 78 (1964).

The District Court, in an extensive and detailed opinion, concluded that the Comptroller's regulations authorize commercial banks to enter the mutual fund business and thereby to engage in the securities activities prohibited by Sections 16, 20, 21 and 32 of the Glass-Steagall Act; that the "units of participation" in the Bank's Account are "securities" within the meaning of the relevant provisions of Glass-Steagall; that in promoting and marketing these securities, banks engage in the business of issuing, underwriting, distributing and selling securities in violation of Glass-Steagall; and finally, that Congress, not the courts, is the appropriate forum to determine whether the stringent prohibitions of Glass-Steagall should be altered.

In a per curiam opinion, the Court of Appeals reversed the decision of the District Court.[10] The Court's opinion contained no discussion of the merits, but stated that the two concurring opinions—one by Chief Judge Bazelon and the other by Judge (now Chief Justice) Burger, in which Senior Judge Miller concurred—set forth the basis of the Court's action. As we point out below, the majority concurring opinion did not deal at all with the critical issues of statutory construction.

* * * * * * *

To put this matter in perspective, it is necessary to review briefly the operation and structure of a collective investment fund of the type authorized by the Comptroller. There is no real controversy as to the

[10] The per curiam opinion stated that "while a majority of the Court has reservations about standing, these doubts have been resolved in favor in reaching the merits in cases of this consequence." *Infra*, p. 3a.

basic facts, as the Comptroller has acknowledged below.

In all significant respects, the collective investment funds authorized by the challenged regulations, and exemplified by First National City Bank's Account, are the functional equivalents of mutual funds.[11] Their purpose is identical; their structure is identical; and the legal relationship of the investor to the fund is identical.[12]

An investor becomes a participant in the Bank's Account by tendering a sum—under present regula-

[11] Chief Judge Bazelon acknowledged that, while several differences are present, "the Account is the functional equivalent of an open-end mutual fund." (*Infra*, p. 7a.) There is virtually unanimous agreement by all informed sources that the challenged regulations of the Comptroller permit the creation of an investment device virtually indistinguishable from a mutual fund. The Chairman of the Securities and Exchange Commission has said that bank-sponsored collective investment funds are "essentially the same as mutual funds." Hearings on Bank and Insurance Company Collective Investment Company Act Amendments of 1967, H.R. 14742, before the House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (1968), p. 122. The Chairman of the Federal Deposit Insurance Corporation has acknowledged that the challenged regulations authorized "bank entry in the mutual fund business." Hearings on S. 2704 before a Subcommittee of the Senate Committee on Banking and Currency, 89th Cong., 2d Sess. (1966), p. 276 (hereinafter referred to as the "1966 Hearings.") Members of Congress and the press have all made clear that what is at stake is bank entry in the mutual fund business. See, *e.g.*, S. Rep. No. 1351 on S. 3724, 90th Cong., 2d Sess. (1968), pp. 10, 11, 22; New York Times, April 30, 1967, sec. 3, p. 1.

[12] For a general description of the structure and operation of open-end management investment companies, or "mutual funds" as they are commonly known, see Report of the Securities and Exchange Commission on the Public Policy Implications of Investment Company Growth submitted to the House Committee on Interstate and Foreign Commerce, H. Rep. No. 2337, 89th Cong., 2d Sess. (1966).

tions, $10,000 or more—to the Bank pursuant to a short, standardized form which accompanies a sales flyer, apparently sent out broadside to all bank customers, announcing the creation of the Account. The promotional literature is accompanied by a copy of the prospectus for the fund. (J.A. 192) In that sales instrument the Bank describes the "opportunity for long-term growth of principal and of income" by investing in the Bank's fund. It advises the prospective investor that, "You should give careful consideration to these factors in deciding whether the Commingled Account provides a suitable investment medium for you." If the prospective investor has any questions, he is invited to telephone the Bank. (J.A. 192)

Further, the potential investor is told that he can invest in the Account merely "by completing the tear-out authorization form on page 13 of the Prospectus and forward[ing] it with his check" to the Bank. (J.A. 192) Upon receipt, the investment is automatically deposited in the Bank's Account and is available, as part of a pool of assets, for the purchase of portfolio securities in furtherance of the Account's investment policy.

Following the standard practice of mutual funds, at the time the investor tenders his money to the bank officer for investment in the Account, a security—denominated a "unit of participation"—is issued to the investor which represents the investor's share in the assets of the Account.[13] As is true of shares in a mutual fund, the "unit of participation" permits the

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[13] Many mutual funds are non-corporate in form and issue securities denominated by a variety of names such as "beneficial interests" and "participatory agreements" (J.A. 236).

investor and the Bank to determine conveniently the investor's proportionate interest in the Account. An investor may redeem his "units of participation" in the Account for cash as he wishes, a feature which is, of course, the hallmark of an open-end mutual fund.

The management structure of the Bank's Account parallels that of a mutual fund. The operation of the Account is supervised by a Committee of five persons, who occupy "a position equivalent to that occupied by the board of directors of a mutual fund." *Infra,* p. 59a. The Bank provides the Account with investment management services, in return for a stated management fee pursuant to an investment advisory contract entered into annually by the Committee and the Bank. The management fee increases as the size of Account increases; the Bank's fee is one half of one percent of the total net asset value of the Account. *Ibid.*

The Bank acts as underwriter of the units of participation pursuant to a contract executed between the Account and the Bank. *Ibid.* Under that contract, the Account agrees that participations will at all times be available for purchase upon the request of appropriate personnel of the Bank. Sales of units of participation are handled exclusively by employees and officers of the Bank and are made without commission or sales load. Mutual funds similarly execute underwriting contracts with distributors, who sell the shares to the public, generally with a sales commission (or load), but in many cases for no commission, (*i.e.,* in the case of so-called "no-load funds"). *Infra,* p. 55a.

The Bank's reports to participants in the Account highlight the speculative nature of the Bank's investment efforts and its aggressive attempts to market its

fund. The six-month report to participants in April, 1967 noted that, "Investing in common stocks and convertible securities for long-term growth of both capital and income is our stated investment policy." In carrying out that policy, the report noted that, "We have invested your funds in ten major industries with emphasis in the office equipment, electrical and electronics, drug and cosmetic, and airline groups." (J.A. 202) Moreover, the Bank compares the performance of its Account with the Dow-Jones Industrial Average, a method of dramatizing investment results frequently used by mutual funds. Thus, the Bank noted that in one period, while the Dow-Jones had increased only 6.5 percent, the Account increased 24.3 percent. (J.A. 202)

These facts demonstrate beyond doubt that First National City Bank is operating and promoting its Account in the same way as any other mutual fund.

REASONS FOR GRANTING THE WRIT

I. THE QUESTIONS PRESENTED ARE OF MAJOR PUBLIC IMPORTANCE

There is virtually unanimous agreement as to the importance of the questions presented by this case. This was explicitly recognized by the Court of Appeals in its per curiam opinion which noted that, although a majority of the Court had reservations about Petitioners' standing to sue, their "doubts have been resolved in favor of reaching the merits in [a case] of this consequence." (*Infra,* p. 37a.) And, in his separate opinion, Judge (now Chief Justice) Burger explained he had concluded that Petitioners had standing "in order to make a majority holding for review of the merits of a subject of such importance." Judge Burger expressed the hope that "consideration of the

merits . . . at our level may be useful to further judicial review." [14] (*Infra*, p. 31a.)

FIRST, the decision below opens the first breach in the Glass-Steagall wall of separation which Congress erected in 1933 between commercial banking and the securities business. It reverses a consistent course of judicial and administrative interpretation of the Glass-Steagall Act over the last 35 years. On the only prior occasion when the Glass-Steagall Act has been considered here, this Court interpreted the Act in such a way as to resolve all doubts against potential intermingling of commercial banking and the securities business, characterizing the Act a "preventive or prophylactic measure." *Board of Governors* v. *Agnew*, 329 U.S. 441, 449 (1947). Indeed, to prove a violation of the Act, the Court held that there was no need to demonstrate that commercial banks were, in fact, guilty of conflicts of interest or other improper dealings in their securities activities.[15] The Court found that the critical

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[14] The controversial nature of the challenged regulations and the importance of the present case have also been recognized and commented upon in the banking industry and in learned journals. See, *e.g.*, Henderson, Widening of Commercial Banks' Functions Advocated by Saxon in Two Distinct Areas, The American Banker, Feb. 5, 1963; Marin, Common Trust Funds—Development and Federal Regulation, 83 Bank. L. J. 565 (1966); Comment, Banks, Trusts and Investment Companies: The Commingled Investment Fund, 115 U. Pa. L. Rev. 1276 (1967); Comment, Regulation of Bank-Operated Collective Investment Funds—Judicial or Legislative Resolution of an Administrative Controversy, 73 Yale L. J. 1249 (1964).

[15] As Senator Bulkley, a major spokesman for the Act, explained prior to its passage:

> "It is not, of course, contended that the abuses here intimated are never avoided by the good conscience of the bankers. On the contrary, I believe they are avoided generally by good bankers. Certainly they are avoided much more often than

element was the *threat* of conflict of interest or improper dealing which was raised simply by engaging in the proscribed activities.[16]

The Federal Reserve Board likewise has interpreted the provision of the Act which it administers (Section 32) for almost thirty years so as to insulate a broad variety of securities activities, including the operations of mutual funds, from commercial banking.[17] Upon

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they occur. Yet the danger is always there, and must be there as long as human nature remains human nature. . . . [W]e must surround the banking business with sound rules which recognize the imperfection of human nature [so] that our bankers may not be led into temptation, the evil effect of which is sometimes so subtle as not to be easily recognized by the most honorable man." 75 Cong. Rec. 9912 (May 10, 1932).

[16] A stringent interpretation of the prohibitions of the Glass-Steagall Act has been applied in rejecting other contentions of the Comptroller for a relaxed reading of the Act. *Port of New York Authority* v. *Baker, Watts & Co.*, 129 U.S. App. D.C. 173, 392 F.2d 497 (1968).

[17] The Board has applied the prohibitions of Section 32 of the Glass-Steagall Act to bar interlocks between commercial banks and a variety of organizations which were engaged in the issuance, sale, distribution or underwriting of securities, such as:

(i) open-end investment companies (or mutual funds) 12 C.F.R. § 218.101 (1951);

(ii) corporations engaged in selling or underwriting mutual funds shares, 12 C.F.R. § 218.107(e) (1963);

(iii) investment advisers which control sales distribution subsidiaries, 12 C.F.R. § 218.107 (1963);

(iv) real estate investment companies frequently issuing a substantial amount of stock relating to their capital, 12 C.F.R. § 218.104(b) (1961);

(v) corporations in special circumstances in the process of organization and selling their own stock, 12 C.F.R. § 218.105 (1961); and

(vi) closed-end investment companies in process of organization, 12 C.F.R. §§ 218.102 (1960), 218.104 (1961).

repeated occasions, the Board has specifically barred interlocking directorates between commercial banks and mutual funds on Glass-Steagall grounds.[18]

SECOND, this is no mere technical issue, but one of great economic significance. The opinion below opens the way for full scale entry by commercial banks into the mutual fund business. It points to the "other bank-sponsored funds likely to follow [which] will compete with mutual funds and with those who market their shares." (*Infra*, p. 2a.) The Comptroller has predicted that, in the next decade, commercial banks operating under the challenged regulations "might capture as much as $2 billion of mutual fund business."[19] In this connection, Chief Judge Bazelon has noted:

> "The major consequences of expanded investment service by banks will be a quantitative change in

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[18] The Federal Reserve Board has consistently ruled that Section 32 prohibits interlocking directorates between member banks and mutual funds. In 1951, for example, the Board held:

> ". . . it is the opinion of the Board that if such [an open-end investment] company is issuing or offering its redeemable stock for sale, it is 'primarily engaged in the issue . . . public sale, or distribution, . . . of securities' and that section 32 of the Banking Act of 1933 as amended, prohibits an officer, director or employee of any such company from serving at the same time as an officer, director or employee of any member bank." 12 C.F.R. § 218.101 (1951).

In 1941, the Board made a definitive ruling on this point, 27 *Fed. Reserve Bull.* 399 (1941), and has stringently adhered to this position. See, *e.g.*, 12 C.F.R. § 218.107 (1963). In the Board's December 15, 1965 Memorandum it stated:

> "Ordinary open-end investment companies or mutual funds have been regarded by the Board as subject to Section 32. Accordingly, the Board consistently has taken the view that interlocking relationships described in the statute between such funds and member banks are prohibited. . . ." 1966 Hearings, p. 585.

[19] *Infra*, p. 49a n.10.

> the volume of securities bought, sold, and held by banks. While substantial transactions in securities by banks may be essential for the modern management of their customers' money, an increase in their already massive securities holdings for the account of customers has some disquieting consequences for the underpinnings of corporate accountability and competition in economy at large." (*Infra,* p. 16a.)

THIRD, the decision of the Court of Appeals casts serious doubt whether the Glass-Steagall Act will remain an effective and viable bar to commercial banks' engaging in traditional mutual fund activity and other securities activities. Because of the functional identity of "units of participation" with shares in traditional mutual funds, the decision raises the question whether such mutual fund shares are "securities" under the terms of the Glass-Steagall Act. Further, because of the distorted construction below limiting the prohibition against "underwriting" to those underwritings which involve a distribution profit, there is serious doubt whether distributing and selling "no load" mutual funds fall within the strictures of the Act. (See *infra,* pp. 24-25.) Also, the Federal Reserve Board's well-established rulings that mutual funds are engaged in "issuing" their own shares within the meaning of the Act (see *infra,* p. 23) have been virtually obliterated by the decision below. Finally, the Court of Appeals' willingness to include speculative securities activity by banks as permissible "fiduciary activities," even though admittedly "new and free wheeling,"[20] casts serious doubt on what, if any, limitations remain upon commercial bank expansion.

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[20] *Infra,* p. 9a.

These important, unanswered questions relating to the Glass-Steagall Act and to Section 92(a) are all the more uncertain because there is no opinion of the court below dealing with these issues. The brief per curiam order casts no light on these questions; the majority concurring opinion disregarded all the questions of statutory construction and improperly treated this matter, in three short paragraphs, as a case involving review of the discretionary action of a federal agency; and only one judge on the Court of Appeals panel even attempted to deal with these difficult issues. It seems self-evident that any relaxation of the express prohibitions of this seminal legislation deserves a full-scale, definitive analysis and exposition. For these reasons alone, this Court should grant certiorari.

II. THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The decision below, permitting banks to reenter the securities business, distorts the clear prohibitions of the Glass-Steagall Act and vitiates the intent of Congress. This result is without support in judicial precedents or the text or history of the statute. Moreover, the conclusion of the Court of Appeals, if permitted to stand, will blur the sharp and comprehensive restrictions on commercial bank activity contained in the Glass-Steagall Act and Section 92a of the National Banking Act and thus could lay the way open for a return to the banking abuses which characterized the economy in the period immediately preceding the financial panic and the Great Depression.

As we have noted above, despite the significance of the issues involved here and the broad implications of its decision, there is, surprisingly, no definitive opinion of the Court of Appeals dealing with the merits of

the case.[21] The concurring opinion of the two-judge majority consisted basically of an abstract discussion of the question of Petitioners' standing to sue, which issue ultimately was resolved in Petitioners' favor. In its abbreviated reference to the merits, the majority did not deal at all with the statutory construction issues relating to the Glass-Steagall prohibitions. Rather, it approached the case as one involving a challenge to the discretionary action of a federal agency and resolved the entire matter with the terse observation that several government agencies had given "careful and comprehensive study to all aspects of [the] problem"; that these agencies "with their accumulated expert experience have decided [the] issues" in question; and, that their decisions "are entitled to substantial deference and on this record I see no reason for disturbing their conclusions." (*Infra*, p. 50a.)[22]

Of course, as the decisions of this Court have made clear, the standard of review adopted by the majority

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[21] There was no discussion of the merits at all in the brief per curiam order.

[22] The majority concurring opinion stated that the court's power to review was

> "narrow and limited; it does not include the power to decide whether the public will be better served by one or the other modes of investment funds so as to achieve diversification, yield, safety or low cost. All that is the primary responsibility of the special regulatory bodies established by Congress for that purpose." (*Infra*, pp. 49a to 50a.)

Petitioners' complaint, of course, did not raise these policy questions or debate the wisdom of commercial bank entry into the mutual fund business. The repeal of the Glass-Steagall prohibitions, if presently justified on such "policy" grounds, is a matter for Congress. See 115 Cong. Rec. H10554, H10559 (Daily ed. November 5, 1969); 114 Cong. Rec. 59497 (Daily ed. July 26, 1968).

concurring opinion is inappropriate in cases charging that administrative action is in excess of statutory authority.[23] Moreover, the fact is, except for the unpublished conclusions of the Comptroller's office, the various regulatory agencies referred to have not resolved Glass-Steagall issues presented in this case. On the contrary, these agencies raised, but expressly declined to rule on, critical Glass-Steagall questions.[24]

Although the minority concurring opinion below addressed itself to the merits of the Glass-Steagall issue, that opinion glossed over the difficult question

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[23] "Administrative determinations must have a basis in law and must be within the granted authority. . . . An agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946) (footnote omitted).

See, also *NLRB* v. *Brown Food Stores*, 380 U.S. 278, 292 (1965); *NLRB* v. *Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477, 499-500 (1960); *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 677-78 (1954); See, also, *Elgin, Joliet & Eastern Ry.* v. *Benj. Harris & Co.*, 245 F. Supp. 467, 472 (N.D. Ill. 1965).

[24] The Federal Reserve Board stated that it "expressed no position with respect to whether [Section 21 of the Glass-Steagall Act] might be held applicable to the establishment or operation of the proposed 'commingled investment account.'" 12 C.F.R. § 218.111 (1965). The Securities and Exchange Commission considered the Account solely from the point of view of the securities laws subject to its jurisdiction; it had no authority to deal with, and made clear it entertained no view upon, the legality under the Glass-Steagall Act of commercial bank entry into the mutual fund business. (See, *e.g.*, Hearings on Amendment No. 438 to S. 1659 before the Senate Banking and Currency Committee 90th Cong., 1st Sess. (1967) p. 1296.) And, the Department of Justice advised the Subcommittee on Banking and Currency and the Securities and Exchange Commission that "it is not clear . . . whether the implementation of the bank's proposal would be a criminal violation" of Section 21 of the Glass-Steagall Act. (1966 Hearings p. 588.) The view of none of the agencies can be considered regulatory approval of the Bank's activities under the Glass-Steagall Act.

of statutory interpretation and misread the extent of Congress' concern in enacting Glass-Steagall.

The Glass-Steagall Act Prohibits Entry by Commercial Banks Into the Mutual Fund Business.

To separate commercial banking from the securities business, Congress enacted four interrelated prohibitions in the Glass-Steagall Act. The keystone provision is Section 21. That Section prohibits a company from engaging simultaneously in two specified lines of business—the first is "issuing, underwriting, selling or distributing . . . securities"; the second is "receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor . . . ," *i.e.*, the business of commercial banking. This Section applies across the board to all types of commercial banks—national and state-chartered; member and non-members of the Federal Reserve System. Section 21 forces a choice: an enterprise can engage in commercial banking or it can engage in issuing, underwriting, selling and distributing securities. Under Section 21, it cannot do both.[25]

The basic prohibitions of Section 21 were supplemented with a number of other protective provisions. In enumerating the corporate powers of national banks in Section 16, Congress included a proviso intended to

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[25] One court has characterized Section 21 as prescribing "complete separation" of commercial banking from any dealing in securities:

> "When Congress meant complete separation, it said so, in this [Section of the] Act, in unmistakable terms. It knew what terms to use, and used them." *Agnew* v. *Board of Governors*, 80 U.S. App. D.C. 377, 385, 153 F.2d 785, 793 (1945), *rev'd on other grounds*, 329 U.S. 441 (1947).

preclude any construction of these powers which would permit national banks to underwrite or deal in securities.[26] 12 U.S.C. § 24. Moreover, Congress made certain that banks did not accomplish indirectly what they were forbidden to do directly. Section 32 prohibits directors, officers or employees of national or state member banks of the Federal Reserve System from holding similar positions in enterprises primarily engaged in the issue, flotation, underwriting, public sale or distribution of stocks, bonds, or similar securities. Section 20 is a parallel provision designed to prohibit interlocks or affiliations between member banks, on the one hand, and companies engaged principally in the securities business on the other. These provisions unequivocally prohibit the establishment of a bank-sponsored mutual fund in the guise of a commingled investment fund.

A. "Units of Participation" are "Securities" within the meaning of the Glass-Steagall Act.

The basic issue of statutory interpretation is whether "units of participation" are "securities" within the meaning of the Glass-Steagall Act. The Government has based its defense of the Comptroller's regulations essentially upon the proposition that such units are not "securities." That position is clearly wrong, as found by the District Court, the only court to rule squarely on this issue.[27]

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[26] *Cf.* Section 5(c), 12 U.S.C. § 335, similarly limiting the powers of state member banks of the Federal Reserve System.

[27] The majority concurring opinion did not deal with this issue. The minority concurring opinion appears to proceed on the assumption that the "units of participation" are not "securities," although it does not, in terms, so hold. (See, *infra*, p. 50a.)

The Act refers to "securities" in a context which makes clear that the term should not be narrowly construed. The language itself—in Sections 20 and 21 "stocks, bonds, debentures, notes or other securities"—commands a broad reading that will not frustrate the policies of the Act.[28]

Bank regulatory officials themselves have made clear that "units of participation" in the Account are "securities" *within the meaning of the Glass-Steagall Act*, just as they have "consistently taken the position that participations or shares in . . . [a] mutual fund are 'securities' for the purpose of Section 32" of the Glass-Steagall Act. 1966 Hearings, p. 583. The Federal Reserve Board held specifically in connection with commingled investment accounts, that

> "Participation or interests in accounts [should] be regarded as 'securities' under Section 32 [of the Glass-Steagall Act]." (*Id.*, p. 584.)

In reaching such a result, neither the District Court nor the Federal Reserve Board construed the term "securities" in the Glass-Steagall Act in an overly-broad way which would cover new or unique types of corporate instruments. Quite simply, the "units of participation" are "securities" because they represent a pro rata interest in an investment media—the

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[28] Thus, the Glass-Steagall Act, in an authoritative opinion of the Federal Reserve Board, has been held to be

> ". . . sufficiently broad to comprehend securities which, while neither stocks or bonds, have attributes which cause them to be 'similar' to or somewhat like, either bonds or stocks." 1966 Hearings, p. 584.

Account—and possess all the indicia of such commonplace securities as shares in a mutual fund.[29]

B. In operating commingled investment funds, banks are engaged in the business of issuing, selling, distributing, underwriting and dealing in securities.

The second critical issue of statutory interpretation is whether a bank-sponsored commingled investment fund will be engaged in any of the activities proscribed by the Act—"issuing, selling, distributing or underwriting" the securities of the fund.[30]

The Bank's Account, like any "open-end" mutual fund, will be substantially engaged in "issuing" its

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[29] Petitioners do not contend that the meaning of "securities" in the Glass-Steagall Act is necessarily the same as its meaning in the Securities Act of 1933. Nevertheless, it is relevant to note that both reform statutes were passed after the same extended series of hearings before the Senate Banking and Currency Committee, in which the finding was made that the activities of national banks were closely connected to the failure of the securities market. It is difficult to believe that the same term— "securities"—would have a radically different meaning in the two Acts without any indication whatever in the legislative history of either statute that such a difference was intended.

[30] The only specific prohibition of Glass-Steagall which the minority concurring opinion discussed was whether a bank sponsoring a commingled investment fund would be engaged in "underwriting." The opinion did not discuss at all whether the bank's activities would constitute "issuing", "selling", or "distributing" within the meaning of the Act. Chief Judge Bazelon apparently avoided dealing with the explicit prohibitions of Section 21 because he considered that section merely an appendage of Section 16 of the Glass-Steagall Act and concluded that the specific prohibitions of Section 21 added little to the provisions of Section 16. There is no justification or legislative support—and none is cited—for so diluting the express prohibitions of Section 21, which extend far more broadly than Section 16. The latter section primarily confers corporate powers on national banks; it deals only peripherally with the *prohibitions* of the Glass-Steagall amendments.

own securities, as that term is used in Glass-Steagall. Units of participation in the Account are continuously available at the Bank and are "issued" to persons investing in the Account.[31] The Account's redemption provisions provide a constant motivation for the Bank to continue to issue and sell participations in the Account to prevent a reduction in its size.[32]

The Federal Reserve Board has repeatedly ruled that such regular and systematic issuance of its shares by a mutual fund—precisely the same activity as that engaged in by the Account—constitutes "issuing" securities within the meaning of the Glass-Steagall Act. Indeed, the Board has ruled that such activity constitutes a *primary* engagement of a mutual fund. The Board explained that:

> ". . . it is apparent that the more or less continued process of redemption of the stock issued by [a mutual fund] would restrict and contract [the fund's] activities if it did not continue to issue its stock. Thus, the issuance and sale of its stock is essential to the maintenance of the [fund's] size and to the continuance of operations without substantial contraction, and therefore the issue and sale of its stock constitutes one of the primary activities of such a [fund]." 12 C.F.R. § 218.101 (1951).

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[31] By the end of its first fiscal year, August 31, 1967, the Account had issued more than 879,000 units of participation. See SEC File 811-1385, Prospectus for Commingled Investment Account of First National City Bank, dated September 22, 1967, p. 3; SEC File 811-1385, Form N-IR, Annual Report of Management Investment Company of the Commingled Investment Account of First National City Bank for Fiscal Year Ended August 31, 1967.

[32] During its first full fiscal year, more than 10,000 units of participation in the Account were redeemed. *Ibid.*

Section 21, of course, prohibits a bank absolutely from engaging in the business of issuing securities—whether or not that activity is a primary function of the bank.

Apart from issuing securities in operating its Account, the Bank is also engaged in the business of selling, distributing, underwriting, and dealing in securities, each of which is independently proscribed by the Glass-Steagall Act. The Account itself has stated that its "units of participation will be lawfully offered by [the Account] through the offices of First National City Bank in New York." (J.A. 140) First National City Bank, through its offices and mailings, has broadly solicited potential customers to invest in the Account by means of a "tear-out authorization form." Units of participation are forwarded by Bank officers in exchange for investors' money. These activities constitute "selling" and "distributing" the participations issued by the Account under any definition of those terms.

Likewise, there can be no doubt that the Bank is engaged in "underwriting" the units of participation even though it receives no direct compensation for its services. In taking the securities issued by the Account and selling them through Bank personnel, the Bank fulfills the traditional underwriter's role.

Without the citation of any persuasive authorities, the minority concurring opinion concluded that the Bank was not engaged in "underwriting" (and presumably also not engaged in "selling", "distributing", and "dealing in" securities) because the Bank did not obtain any direct distribution profit or sales commissions from its underwriting activities, even though

the Bank admittedly will receive a substantial management fee which will increase as more participations in the Account are sold. However, it is clear that earning a distribution profit is not a necessary indicia of underwriting or distribution under the Act. In a definitive interpretation, the Federal Reserve Board has held that a mutual fund continuously issuing its shares—as the Bank's Account will—is engaged in the "public sale" and "distribution" of its securities within the meaning of Glass-Steagall, irrespective of the fact that "the investment company does not derive any direct profit from the sales" of these shares.[33]

To read into the definition of "underwriting" and related terms in the Glass-Steagall Act the requirement that the underwriting function must produce a distribution profit would lead to the astonishing result that banks would be free to sponsor, promote, and sell the shares of traditional mutual funds of the no-load variety.[34]

Given this understanding of the role of banks in promoting collective investment funds as generally-available investment devices in clear violation of the prohibitions of Glass-Steagall, it is clear that such unlawful sales and promotional efforts cannot be justified as the exercise of traditional fiduciary activity

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[33] 12 C.F.R. § 218.101 (1951).

[34] The establishment of the Account also conflicts with Section 16 which restricts national banks to the purchase and sale of securities "for the account of customers." That provision insured that nothing in the Act was construed as denying banks the right to order the purchase or sale of securities on specific instructions from, and for the account of, their customers.

under the banking laws.[35] Established fiduciary relationships have always arisen "from individually negotiated trust agreements, individually negotiated managing agency accounts, or similar arrangements . . . ."[36] However, the operation of the Account, an investment device open to the public at large, represents a sharp departure from such regular and accepted banking practices. The Bank's Account is a "package deal offered to all comers" (*infra,* p. 10a); there is no attention to the financial and personal needs of the individual investor, a fact which characterizes the proffer of true fiduciary services. The only standard to determine whether the Bank's Account is suitable in a given case is a showing that the potential investor has the required $10,000 to invest.[37] This is a rela-

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[35] Section 92a of the National Banking Act authorizes the Comptroller to grant a national bank power to act as a trustee and in other conventional fiduciary roles:

> "When not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver Committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located."

[36] Statement of Chairman Manuel F. Cohen of the Securities and Exchange Commission, 1966 Hearings, p. 136.

[37] In the words of Chief Judge Bazelon:

> "The bank's affidavit states that it will accept the customer's money if it is satisfied that the Account's investment policy is suited to his needs. It appears from the mailing to 'valued customers,' however, that they will be acceptable if they read the invitation, with its caveats, and the prospectus and send in the tear-out authorization with $10,000. . . ." (*Infra,* p. 13a n.9.)

tionship of the commercial market place, not that of the fiduciary and his cestui que trust.

Respondents contend that the establishment of a bank-sponsored mutual fund is merely an imperceptible extension of true fiduciary services previously offered by national banks in the form of common trust funds where a bank holds money in the capacity of strict trustee. However, the Federal Reserve Board has been careful to limit the use of common trust funds to bona fide fiduciary purposes[38] and repeatedly warned banks against aggressive use of advertising which might turn a common trust fund into a mutual fund device.[39]

C. A strict interpretation of the prohibitions of Glass-Steagall is consistent with Congress' intent in separating commercial banking from the securities business.

The legislative record lends support to a stringent reading of the relevant prohibitions of Glass-Steagall to bar banks from promoting and operating bank-sponsored mutual funds.

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[38] In this connection, the Board stated:

"[In permitting] the operation of Common Trust Funds, the Board intended that a Common Trust Fund should be used merely to aid in the administration of trusts by a trust institution through the commingled investment of funds of various trusts . . . it was contemplated that [the] trust guise or form should not be used to enable a trust institution to operate a Common Trust Fund as an investment trust attracting money seeking investment alone and to embark upon what would be in effect the sale of participations in a Common Trust Fund to the public as investments." 26 Fed. Reserve Bull. 393 (1940).

[39] 42 Fed. Reserve Bull. 228 (1956).

A major concern of Congress in passing Glass-Steagall was to deal with the inherent conflicts of interest faced by a bank advising a customer to invest in securities in which the bank has a financial interest. In its investigations prior to the passage of Glass-Steagall, Congress focused upon the need for banks to give "disinterested investment counsel" and the inexorable conflict of interest which arose where bankers, consulted in their role of financial adviser, actually had "something to sell" to their customers which would result in a profit to the bank.[40]

The prospect of "profit" for a bank operating a collective investment fund and the risk of undue influence upon the investment advice a bank gives its customers is clear.[41] The bank's management fee is directly related to the size of the fund—the more participations sold, the greater the bank's fee. There is also a continuing pressure on the Bank and its officers to market participations because of the redemption feature of the commingled fund. This situation, where the bank clearly stands to gain if it steers potential investors to its own mutual fund, illustrates one of the most wide-

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[40] In this regard, the Report of the Senate Committee on Banking and Currency stated:

> "Commercial banks found a fertile field among its [sic] depositors for purchasers of security issues which their investment affiliates were sponsoring. These banks, violating their fiduciary duty to depositors seeking disinterested investment counsel from their bankers, referred their depositors to the affiliates for advice." S. Rep. No. 1455, 73rd Cong., 2nd Sess. (1934) p. 163. *Cf.* 75 Cong. Rec. 9912 (1932).

[41] The minority concurring opinion below conceded that because "the Bank's compensation is tied to the size of the fund, there will be pressure to market the participations to maintain and increase its assets." *Infra*, p. 13a.

spread abuses which Congress identified and intended to reach in the Glass-Steagall Act.[42]

There were a number of other potential conflicts which Congress found to exist when commercial banks engaged in the securities business, each of which is present in the Comptroller's proposal that banks operate mutual funds.[43] Then, banks had become identified with their securities affiliates and had a substantial interest in assuring their success, an interest which might well have affected the independence of the bank's judgment. Today, a bank would have a similar interest in the performance of its collective investment fund

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[42] The Congressional purpose of assuring disinterested investment advice, expressed in the applicable sections of Glass-Steagall, is reflected in the exemptive provision which was added to Section 32 by the Banking Act of 1935, 49 Stat. 709 (1935), 12 U.S.C. § 78. That provision permits the Federal Reserve Board to make exceptions to the prohibitions on interlocking relationships in Section 32 by general regulation, but only on a showing that such exceptions will "*not unduly influence . . . the advice [the bank] gives its customers regarding investments.*" (Emphasis added.) The Federal Reserve Board has also commented upon this problem of impartial investment advice as a principal danger that Congress "regarded as justifying the separation of commercial banks from the underwriting field":

> ". . . that the quasi-fiduciary responsibilities of banks in giving investment advice to customers (including 'correspondent' banks) would not be discharged with optimum effectiveness if the advisor bank was subject to a conflict between its own interests (or those of its personnel) as investment banker and the interests of its customers as investors." Memorandum of the Board of Governors of the Federal Reserve System as Amicus Curiae, pp. 5-6, *Baker, Watts & Co.* v. *Saxon*, *supra*, Civ. Act. No. 97-66 (D.D.C.).

[43] See *Relation of Banks with the Securities Market*, Hearings Pursuant to S. Res. 71, before a Subcommittee of the Senate Committee on Banking and Currency, 71st Cong., 3rd Sess. (Appendix) (1931), pp. 1063-64.

and its portfolio of securities, thus possibly influencing the bank, in its creditor role, to support a lagging portfolio company.[44]

Finally, it should be noted that Congress' concern was not directed exclusively, as the minority concurring opinion below asserted, to investment practices which risked a bank's own assets.[45] A principal focus of the Senate investigation of the banking and securities industries was the practice of establishing investment "affiliates" of national banks—including investment trusts like those involved here—which bought and sold securities purely for investment or speculative

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[44] Furthermore, Congress was aware that a bank's goodwill and reputation might suffer, with damaging consequences to the economy at large, if the securities owned by the bank's affiliate lost their value. *Id.* at 1064. The Federal Reserve Board has recently echoed this Congressional concern. 12 C.F.R. § 218.104(c) (1961).

A related risk with which Congress was concerned arises from the fact that large city banks, which will presumably be operating collective investment funds, act as correspondents to large numbers of banks in smaller communities throughout the country. There is a clear risk that large banks operating collective investment funds would use these correspondent relationships to influence smaller banks to steer their customers to the bank mutual fund. Protection of the integrity of such correspondent relationships and avoiding the risk of their contamination were of prime concern to Congress in adopting the Glass-Steagall Act. 75 Cong. Rec. 9910 (May 10, 1932).

[45] Significantly, the activities of many of the most prominent and notorious of investment affiliates, including those of Respondent Bank, *in no way risked the assets or capital of the affiliated bank*. S. Rep. No. 1455, 73rd Cong., 2nd Sess. (1934) pp. 156-159; 75 Cong. Rec. 9909-9910 (May 10, 1932). Indeed, Congress was fully aware that a major reason why banks organized affiliated investment companies was to protect the assets of the affiliated bank and the monies of its depositors. Obviously, Congress did not restrict its concern only to investment activities of affiliates that risked the assets of the parent bank. *Id.* at 9911.

purposes and whose activities did not affect the assets of the bank.[46]

CONCLUSION

For the foregoing reasons, Petitioners pray that the petition for a writ of certiorari be granted.

Respectfully submitted,

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November 12, 1969

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[46] The prohibitions of Glass-Steagall were understood at the time of the passage of the Act to bar relationships between a bank and a collective investment fund of the type authorized by the Comptroller's regulations. The record herein describes one such situation where a commercial bank was actively engaged prior to the passage of the Glass-Steagall Act in selling and offering shares in a collective fund whose operations were virtually identical to those of a present day mutual fund. The fund and its investment adviser were terminated in 1934 "[i]n consequence of certain provisions of the Banking Act of 1933 [the Glass-Steagall Act] and recent rulings of the Federal Reserve Board made pursuant thereto . . . ." (J.A. 51)

See "Relations of Banks with the Securities Market," Hearings Pursuant to S. Res. 71 Before a Subcommittee of the Senate Committee on Banking and Currency, 71st Cong., 3rd Sess., (Appendix) (1931) p. 1057.

APPENDIX

APPENDIX

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,164

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.,
Petitioner

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent

FIRST NATIONAL CITY BANK,
Intervenor

Petition to Review Orders of the
Securities and Exchange Commission

No. 21,661

FIRST NATIONAL CITY BANK,
Appellant

v.

INVESTMENT COMPANY INSTITUTE, et al.,
Appellees

No. 21,662

COMPTROLLER OF THE CURRENCY, WILLIAM B. CAMP,
Appellant

v.

INVESTMENT COMPANY INSTITUTE, et al.,
Appellees

Appeals from the United States District Court
for the District of Columbia

Decided July 1, 1969

Before: BAZELON, *Chief Judge*, WILBUR K. MILLER, *Senior Circuit Judge*, and BURGER, *Circuit Judge*.

PER CURIAM:* In these appeals the mutual fund industry levels a two-pronged attack on a national bank's authority to operate a collective investment fund as a service of its trust department. The fund is a commingled managing agency account, similar in most respects to an open-end mutual fund. First National City Bank's Commingled Investment Account (the Account) and other bank-sponsored funds likely to follow will compete with mutual funds and with those who market their shares. Competitors claiming that the Account is unlawful are the Investment Company Institute (ICI), an association of mutual funds and their investment advisers and underwriters; and the National Association of Securities Dealers (NASD), whose members sell shares in open and closed-end mutual funds.

The Account was registered with the Securities and Exchange Commission as an investment company under the Investment Company Act of 1940, 15 U.S.C. § 80a-1, and approved by the Comptroller of the Currency as a bona fide fiduciary activity authorized for national banks by § 92a of the Federal Reserve Act of 1913, 12 U.S.C. § 92a. The NASD intervened before the Securities and Exchange Commission to oppose the grant to the Account of exemptions from certain provisions of the Investment Company Act, and now seeks to set aside the Commission's orders granting them.[1] The ICI sued the Comptroller of the Currency

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* These opinions were prepared prior to June 21, 1969 and are issued pursuant to the Judgment of this court entered on that date. [Footnote by the Court.]

[1] The petition for review of the Commission's order was previously dismissed by this court on the ground that the NASD lacked standing as a party aggrieved under § 80a-42(a) of the Investment Company Act. *National Association of Securities Dealers* v. *Securities & Exchange Comm'n*, No. 20164 (decided Nov. 21, 1967). A petition for rehearing en banc was granted, and the division opinion

and First National City Bank (the Bank) in the United States District Court for the District of Columbia for a declaratory judgment invalidating so much of the Comptroller's Regulation 9, 12 C.F.R. § 9.18, as permits national banks to operate this type of account. Upon cross-motions for summary judgment, the District Court invalidated portions of the regulation and required the Comptroller to rescind approval of the Account. *Investment Company Institute* v. *Camp,* 274 F. Supp. 624 (1967). From that judgment, the Comptroller and the Bank appeal.

Each appeal raises difficult questions of competitors' standing. While a majority of the court has reservations about standing, these doubts have been resolved in favor of reaching the merits in cases of this consequence. On the merits, we are agreed that the actions taken by the Securities and Exchange Commission and the Comptroller are fully consonant with the statutes committed to their regulatory jurisdictions. Accordingly, we affirm the orders of the Securities and Exchange Commission and reverse on the merits the judgment of the District Court in favor of the Investment Company Institute. It is so ordered.

The opinion of Judge Burger, in which Judge Miller concurs, and the opinion of Chief Judge Bazelon, which follow, set forth the reasons for our action:

BAZELON, *Chief Judge,* concurring: First National City Bank's plan to operate a collective investment fund has generated complex and controversial issues for resolution by the Comptroller of the Currency and the Securities and Exchange Commission. Because this innovation in banking will create massive competition for the mutual fund industry, its members have brought the dispute to court. For the reasons stated at the conclusion of this opinion, I

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vacated on January 1, 1968. The en banc order was subsequently vacated on April 12, 1968, to permit the assigned division to reconsider the matter. The case was consolidated for decision with Nos. 21661-62, and considered without reargument.

believe that representatives of the mutual fund industry have standing to adjudicate the important legal questions aired at length before the administrative agencies.

On the merits, the cases together present an interplay of administrative decisions designed to serve different but complementary regulatory aims. The Bank's plan straddles two sets of statutes. The result of a complicated, if sometimes awkard, accommodation of the requirements of each. Petitioners below claim that this accommodation compromises the vital protection to investors and bank customers afforded by the securities and banking laws, and creates a dangerous blend of securities dealing and commercial banking. From an analysis of the relevant statutes and their legislative history, I conclude that the Account, subject to the mutually reinforcing regulations imposed by the Comptroller and the Commission, was established in accordance with law.

I

Introduction

Since 1962, the Comptroller has exercised authority under § 92a of the Federal Reserve Act to grant national banks, by special permit, the authority to exercise trust and other fiduciary powers,[1] namely:

> . . . to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

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[1] Regulatory responsibility for the fiduciary activities of national banks was transferred from the Federal Reserve Board to the Comptroller pursuant to Public Law No. 87-722, 76 Stat. 668 (1962), codified at 12 U.S.C. § 92a (1964).

Section 92a(j) authorizes the Comptroller to issue such rules as he deems necessary to enforce the proper exercise of those powers. In April 1963 the Comptroller issued revised Regulation 9, 12 C.F.R. § 9.18, which authorized for the first time the commingling of managing agency accounts under national banks' fiduciary powers.

The background of Regulation 9 needs brief mention. Since the thirties, banks have been authorized to act as managing agents to purchase and sell stock for a single principal, 1934 *Fed. Reserve Bull.* 609, but the cost of bank management made it prohibitive to offer this service to investors without very substantial assets. For example, the Bank's minimum for an individual managing agency account is $200,000. Prior to 1963, national banks were authorized by the Federal Reserve Board to commingle and invest customers' funds only if held in its capacities as trustee, executor, administrator, or guardian, and funds held as part of a tax-exempt pension and profit sharing or stock bonus plan of employers for the benefit of employees. Regulation F, 12 C.F.R. § 206 (1959 Rev.). The Federal Reserve Board, moreover, had consistently taken the view that common trust funds should not be used as a medium to attract customers primarily seeking investment management of their funds.[2] After the responsibility for regulating bank trust powers was transferred to the Comptroller, that office concluded, after study, that existing regulations should be broadened to extend the advantages of collective investment to managing agency accounts.

The Bank proposed the establishment of a commingled managing agency account pursuant to the revised regula-

[2] 26 *Fed. Reserve Bull.* 393 (1940), 12 C.F.R. § 206.102 (1947); 42 *Fed. Reserve Bull.* 228 (1956); and see 25 Fed. Reg. 12479 (1960), announcing the Board's intention to investigate whether the common trust fund regulations should be amended to exclude inter vivos trusts, because the device of the revocable trust could and had been used to obtain investment management through a common trust fund.

tion.[3] Under the Bank's plan, a customer deposits a minimum of $10,000 under a broad authorization permitting the Bank to invest the funds with those of other participants in the plan. The customer is a principal, and the Bank, his managing agent. The customer receives an undivided interest in the fund, expressed as a "unit of participation." These units are redeemable at net asset value, and are not transferable except to other participants in the plan. No sales load or redemption charge can be imposed.

The Account is registered as an investment company under the Investment Company Act, and the units of participation are registered as securities under the Securities Act of 1933, 15 U.S.C. § 77a (1964). The Bank is both investment adviser to the Account and statutory underwriter for the units of participation issued. The Account is subject to a Committee with the powers of a board of directors, whose members are elected annually by the participants. The Bank sought and received exemptions from provisions in the Investment Company Act which would have required that a majority of the Committee be unaffiliated with the Bank. The Securities and Exchange Commission required that at least two of the five Committee members must be persons unaffiliated with the Bank, but the other three will normally be officers of its Trust and Investment Division.

The Account is managed by the Bank pursuant to a management agreement which must be approved by the participants at their first annual meeting. Thereafter, the contract must be approved annually by the participants or by

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[3] The Bank's plan does not conform in all respects to Regulation 9 as originally issued due to the adjustments required to satisfy the requirements of the Investment Company Act. The plan, as amended, received the Comptroller's written approval under 12 C.F.R. § 9.18(c)(5), and it is expected to set the pattern for other bank-sponsored investment funds. There is accordingly no need to review the provisions of Regulation 9 as it was originally promulgated.

the Committee, including both Committee members unaffiliated with the Bank.

The Account is the functional equivalent of an open-end mutual fund, but there are several differences. The Comptroller's regulations provide that the units of participation or shares may not be marketed through regular channels of public distribution; participation is offered and publicized only through the Trust Department. 12 C.F.R. § 9.18(b)(5)(iii) and (iv) (1968). The Bank's compensation is limited by regulation to the sum of the fees normally charged for separate management of such accounts, namely, ½ of 1 percent per annum of the average net asset value of the fund. 12 C.F.R. § 9.18(b)(12). Finally, and most important, the Account is under the supervision of the Comptroller like other banking functions. This includes review of the fund's investments to see that they are in accordance with sound fiduciary principles. 12 U.S.C. § 481 (1964), 12 C.F.R. § 9.11(d) (1968).

II

Validity of the Account Under the Banking Laws

The District Court held that the Account is unlawful on two grounds: (1) the commingled managing agency account is not a fiduciary activity within the purview of § 92a of the Federal Reserve Act and is not open to State banks under the law of New York, and (2) the maintenance of the fund violates §§ 16, 20, 21, and 32 of the Glass-Steagall Act, 12 U.S.C. §§ 24 (seventh), 377, 378, 78 (1964).

A. *The Federal Reserve Act*

The District Court relied on the differences between the trustee and agency relationships, noting especially the higher standard of care of a trustee, to conclude that a collective managing agency account was not a true fiduciary activity within the purview of § 92a of the Federal Reserve

Act. The differences between the traditional trust relationships of trustee, executor, or administrator and the contractual principal-agent relationship do not, in my view, make the agent any less a fiduciary, nor does commingling of funds, subject to the principal's authorization, change the fiduciary character of the duty owed to each. *Brown* v. *Christman*, 75 U.S. App. D.C. 203, 126 F.2d 625 (1942). The District Court apparently recognized that the Account might pass muster under the phrase authorizing banks to act "in any other fiduciary capacity," but held that it did not qualify as an activity open to competing State banks under the New York law.

Section 100-c of the New York Banking Law specifically authorizes trust companies to commingle funds held in the strict trust capacities, but New York law contains no specific grant of authority to commingle funds held as managing agent. The District Court concluded that the absence of such authority was an implied prohibition. Section 100-c, however, simply permits commingling in cases where the governing trust instrument does not authorize it. The conditions on commingling imposed by § 100-c have not been imposed upon collective accounts authorized by a trust instrument. The real question, therefore, was whether commingling was permissible under the general authority of § 100, which empowers a State bank to act as agent for any lawful purpose and to manage a principal's funds according to the terms of the power conferred upon the bank. N.Y. Bank. Law § 100(1) and (5) (McKinney 1950).

Since the decision of the District Court, the New York State Banking Department has given formal approval of commingled managing agency accounts to two New York banks, stating that the operation of the accounts is authorized by § 100 of the Banking Law. Appellee ICI describes this approval as a defensive response to enable State banks to meet the national banks' competition. This is surely true. Prior to the Comptroller's issuance of revised Regu-

lation 9, no State banks operated commingled managing agency accounts. Still, the Banking Department's action cannot fairly be dismissed as merely following the Comptroller's lead. The question of whether collective accounts are a proper fiduciary activity for banks appears to have been open under both Federal and New York law, and both banking agencies could reasonably have resolved it the same way.

The Bank concedes, of course, that the commingling of managing agency accounts represents a departure from past banking practice of limiting commingling to funds held by the Bank in the traditional trust capacities and as trustee of a pension or profit-sharing trust. Regulation 9.18 permits banks to serve multiple principals under a standard agreement vesting the bank with broad discretion to invest their money, subject to the duties and liabilities of a managing agent, and not a trustee. This is a new and free-wheeling form of fiduciary activity.

I am persuaded, however, that the Comptroller's regulations, together with the protection of the customer *qua* investor afforded by the securities acts, will reasonably assure the proper exercise of this broad fiduciary power. The restrictions imposed by Regulation 9, 12 C.F.R. § 9, secure the Comptroller's powers of examination and supervision of the Account. (§§ 9.8, 9.9.) The rules safeguard the fiduciary relationship by requiring the separation of the Account's funds from other assets (§§ 9.13, 9.18(b)(2)), by enforcing the obligations to refrain from self-dealing and conflicts of interest (§§ 229.10, 9.12, 9.18(b)(8)), and by limiting the Bank's charge to its normal fiduciary compensation (§§ 9.15, 9.18(b)(12)).

The major difference between the Bank's relationship to the customers of the Account and its relationship to the beneficiaries of other management and trust services is the absence of an individually negotiated agreement. The character of the Bank's initial advice and ultimate account-

ability to the customer is necessarily altered by a package deal offered to all comers. This was one reason why the Securities and Exchange Commission required registration of the Account.[4] The provisions for disclosure and participant control contained in the securities laws substantially compensate for the drawbacks of a standardized fiduciary service. The Securities Act of 1933 requires that potential customer-investors receive a prospectus describing the management of the Account, its investment objectives and policies, and the rights of participants. 15 U.S.C. § 77j (1964). Periodic reports and proxy statements must be issued for inspection by both the participants and the Commission. §§ 80a-20(a) and 80a-29(d). Pursuant to the provisions of the Investment Company Act, participants in the Account will elect their directors (§ 80a-16(a)), retain the power to terminate the contract (§ 80a-15(a)(3)), and ratify the selection of auditors (§ 80a-31(a)(2)). The interests of the principals participating in the Account, though not identical, are bound to be similar; and as a group, they possess a measure of control over the management of their money. Dual regulation by the Comptroller and the Commission should assure the proper operation of the Account.

B. *The Glass-Steagall Act*

The District Court held that the Comptroller's authorization of the Account violated four provisions of the Glass-Steagall Act. It held that in the issuance of units of participation, the Bank was engaged in the business of dealing in securities for its own account in violation of §§ 16 and 21, and that the relation between the Bank and the Account was an affiliation or interlocking directorate between a bank and an organization principally engaged in the securities business in violation of §§ 20 and 32 of the Act.

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[4] See Statement of then Chairman Manuel F. Cohen, *Hearings on S. 2701 Before a Subcommittee of the House Committee on Banking and Currency*, 89th Cong., 2d Sess. 132-38 (1966).

(1) *Sections 16 and 21*

Section 16 of the Glass-Steagall Act imposes the following limitation upon bank dealing in securities:

> . . . The business of dealing in securities and stock by the [national banking] association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock. . . . [12 U.S.C. § 24 (seventh).]

Section 21 of the Act prohibits commercial banks from engaging in the business of "issuing, underwriting, selling or distributing" most types of securities.[5] Because the units of participation in the Account are securities, and the Bank is the statutory underwriter under the Securities Act of 1933, the District Court held that the Bank is engaged in the selling and underwriting of securities prohibited by §§ 16 and 21 in operating the Account.

The words security and underwriter in the Securities Act of 1933 are terms of art with a high gloss. Their expansive definitions under the Securities Act cannot be imported wholesale into the Glass-Steagall Act when the two statutes serve different purposes, in different contexts of risk to the public. The securities laws are intended to protect investors, primarily through disclosure requirements. Their terms have been interpreted broadly to afford their protection to purchasers of all manner of investment inter-

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[5] The Glass-Steagall Act permits banks to market government revenue bonds backed by the taxing power of the public authority issuing the bonds. 12 U.S.C. § 24 (seventh). The Comptroller's regulation broadening bank underwriting authority to include revenue bonds was invalidated in *Baker, Watts & Co.* v. *Saxon*, 261 F.Supp. 247 (D.D.C. 1966), *affirmed sub nom. Port of New York Authority* v. *Baker, Watts & Co.*, 129 U.S.App.D.C. 173, 392 F.2d 497 (1968).

ests, wherever it is needed. The Glass-Steagall Act, by contrast, was enacted to protect bank depositors and the banking system from the risk of insolvency incident to widespread investment of banks' assets in speculative securities during the twenties. Banks frequently not only invested in speculative securities, but entered the business of investment banking by underwriting original issues. Some of these activities were undertaken directly; others were carried on by securities affiliates formed and controlled by the banks to evade completely the weak restrictions upon direct bank dealings in speculative securities. Section 16 of the Act was addressed to three problems:

> (1) Banks commonly invested their own assets in securities, risking commercial and savings deposits if the securities declined in value.[6]
>
> (2) Direct bank investment in securities created pressure for banks to make unsound loans to maintain the price of securities or the financial position of companies in which the bank had holdings.[7]
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> (3) Large city banks frequently acted as issuers, or underwriters of blocks of securities, distributing them at a profit through correspondent country banks. The banks' pecuniary interest in the ownership, price, or distribution of securities created incentive to steer customers into investing in what the banks had to sell.[8]

The problem of risk to deposits does not arise here, because the securities in the fund are purchased for the account of the customer, not the Bank. The ICI does claim, however, that the Bank's indirect holdings in the Account

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[6] *Hearings Pursuant to S.Res. 71 Before a Subcommittee of the Senate Committee on Banking and Currency*, 71st Cong., 3d Sess. 1055-66 (1931).

[7] *Id.* at 1063-64.

[8] See Address of Senator Bulkley, 75 Cong.Rec. 9912 (1932).

may amount to an interest in individual companies sufficient to influence its credit decisions. The short answer is that, since this indirect risk is present in all bank investments in securities for the account of customers, that problem was not within the contemplation of the Glass-Steagall Act.

With regard to the third abuse treated by § 16, the ICI points out that because the Bank's compensation is tied to the size of the fund, there will be pressure to market the participations to maintain and increase its assets. I agree.[9] But the Bank is under similar pressure to sell all the services of its trust department. The Bank's interest in earning a regulated fiduciary charge bears little resemblance to its interest in earning an indeterminate distributing profit from securities which it owns or underwrites, and the interest forbidden by § 16 is the latter.

Section 21 of the Act prohibits banks from engaging ". . . in the business of issuing, underwriting, selling or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities . . . ." It was enacted to extend the prohibitions of § 16 to members of the Federal Reserve System who were not national banks. Congress did not intend

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[9] The Bank would have us stress the restrictions upon merchandising the Account. The Bank is authorized to offer participations in response to unsolicited requests, to persons on Bank premises, and to existing customers. The Bank's affidavit states that it will accept the customer's money if it is satisfied that the Account's investment policy is suited to his needs. It appears from the mailing to "valued customers," however, that they will be acceptable if they read the invitation, with its caveats, and the prospectus and send in the tear-out authorization with $10,000. The $10,000 minimum should accomplish a measure of natural selection, but the Bank's decision on the customer's suitability is unlikely to be so discriminating that the decision itself is a check on the issuance of participations. At any rate, the merchandising problem is more relevant to the question of the proper exercise of fiduciary powers than to entry into the securities business within the meaning of the Glass-Steagall Act.

to bar those banks from buying and selling securities "for the account of customers," so § 21 appears to add nothing to the argument under § 16. If anything, the language of § 21 confirms the view that Congress was concerned in both provisions with prohibiting bank dealing in speculative securities for the traditional and direct form of distribution profit.[10]

(2) *Sections 20 and 32*

Sections 20 and 32 of the Act were enacted to maintain the separation between commercial banking and securities dealing by prohibiting interlocks and affiliations of personnel. Section 20 forbids certain types of bank affiliation with any organization "engaged principally" in the same brand of securities dealing forbidden as a direct bank activity by § 21. One type of prohibited affiliation, defined in § 221a(b)(3), ordinarily exists when a majority of the directors of a securities organization are also directors of any one member bank.

Section 32 generally prohibits directors, officers, or employees of organizations "primarily engaged" in securities dealing from serving in those capacities for a member bank. The Federal Reserve Board has consistently held that § 32 prohibits bank officials from serving as officials of open-end investment companies because such companies (mutual funds) are primarily engaged in issuing their own shares. 12 C.F.R. § 218.101 (1951). The Board ruled, however, that the Account and the Bank were a single

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[10] Section 21 provides criminal penalties for willful violations. The Attorney General is charged with prosecutions under § 21, and has indicated that, while it is not clear whether the operation of the Account would involve criminal liability, the approval of the banking agencies precludes a prosecution against the Bank. See letter of January 24, 1966, to the Securities and Exchange Commission from Assistant Attorney General Fred M. Vinson, in *Hearings on S. 2704 Before a Subcommittee of the House Committee on Banking and Currency*, *supra*, n. 4 at 588.

entity for purposes of § 32, since the Account would be a department of the Bank except for purposes of the Investment Company Act. So long as the Account remained under the "effective control" of the Bank, the Board stated that there was no prohibited interlock under § 32. 30 Fed.Reg. 12836 (1965), adding 12 C.F.R. § 218.111(j) (1965).[11]

The participants' reserve power to sever the connection with the Bank would be worth something in the event of extraordinary mismanagement, but barring this contingency, the Account will remain part of the Bank's organization. Under the single entity theory, the Bank cannot interlock with itself, but that is not really the point. The clear purpose of §§ 20 and 32 is to prevent banks from entering into prohibited forms of securities dealing by the back door. We have held that the Bank may enter the business of operating the Account by the front door. The organizational pattern imposed to satisfy the requirements of the Investment Company Act does not in this context create a prohibited interlock or affiliation any more than the Account itself constitutes a forbidden excursion into the securities business.

The establishment of a bank-sponsored collective investment fund is not barred by the banking laws. A commingled managing agency account is a descendant of the individual managing agency account and the common trust fund, fitting within the traditional authority of banks to manage other people's money in a fiduciary capacity sanctioned by the Federal Reserve Act. Where the fiduciary tie between the bank and multiple principals is looser, the Comptroller's regulations and the securities laws will

[11] See also the Board's letter of March 31, 1966, to the Bank stating that its ruling would stand even though the Securities and Exchange Commission required that there be two independent directors, or 40 percent of the Committee, instead of the single unaffiliated director proposed by the Bank.

take up the slack. The essential element in this judgment on the applicability of the Glass-Steagall Act is the fact that the securities in the Account are bought and sold for the account of customers. The sale of an investment service to a potentially large number of customers gives rise to obligations under the securities laws, but these do not convert otherwise lawful transactions for the account of customers into prohibited securities dealings within the meaning of the Glass-Steagall Act.

The major consequence of expanded investment service by banks will be a quantitative change in the volume of securities bought, sold, and held by banks. While substantial transactions in securities by banks may be essential for the modern management of their customers' money, an increase in their already massive securities holdings for the account of customers has some disquieting consequences for the underpinnings of corporate accountability and competition in the economy at large.[12] The dimensions of the problem are broader, however, than the banking laws on the books. The Glass-Steagall Act enforces the separation of commercial banking and a particular kind of securities dealing. Its legislative history affords little support and even less guidance for a judicial decision to limit bank transactions in securities for customers because today they differ in degree.

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[12] For recent comment on the power of banks as institutional investors to control so-called publicly held corporations, see *Studies by the Staff of the Cabinet Committee on Price Stability* 52-54 (Jan. 1969). See also a warning that the trend toward conglomerate banking makes it possible for banks to condition access to credit upon the borrower's use of the bank's other services and dealings with its subsidiaries in "The Growth of Unregistered Bank Holding Companies—Problems and Prospects," *Staff Report for the House Committee on Banking and Currency*, 91st Cong., 1st Sess. 2 (1969).

III

Validity of Exemptions From § 10 of the Investment Company Act

The NASD, for its part, claims that the Bank's control of the Account is all too effective. It contests the orders by the Securities and Exchange Commission granting certain of the exemptions from § 10 of the Investment Company Act requested by the Bank prior to registration of the Account as a diversified, open-end management investment company under the Act. The exemptions together permit 3 or 60 percent of the Account's five-member Committee to be persons affiliated with the Bank.

Section 10 of the Act was enacted to protect shareholders of investment companies from exploitation by insiders with conflicting interests in other companies or lines of business by requiring that a certain percentage of directors be free of affiliations which may involve divided loyalties. Without the exemptions, § 10 of the Act would preclude the Account from having a majority of directors who are officers, directors, or employees of (1) a principal underwriter, 15 U.S.C. § 80a-10(b)(2), (2) investment bankers, § 80a-10(b)(3), and (3) a single bank, § 80a-10(c). While the Bank fits each of these statutory categories, the overriding issue is the propriety of the exemption granted from § 10(c) to permit a maximum of three instead of two Bank officers to serve on the five-member Committee. A working majority of Bank directors was essential to allow the Account to function in conformity with the banking laws.

Before considering the exemption from § 10(c), it bears emphasis that there is nothing unusual in the fact that the Bank as investment adviser has majority control of the Committee of the Account. Open-end investment companies have traditionally been controlled and managed by their investment advisers; investors are buying their advice. Section 10(a) of the Act provides that 60 per-

cent of the directors of an investment company may be affiliated with the investment adviser. Section 10(d), moreover, permits certain types of "no-load" funds to have only one unaffiliated director if they meet specified conditions. The Bank sought but was denied an exemption which, if granted, would have enabled it to have only one unaffiliated Committee member.[13]

Given these facts, the NASD's assertion that the Committee will abdicate its supervisory responsibilities because the Bank has "effective control" of the Account in the eyes of the banking authorities requires a showing of something more than the normal pattern of majority control by an investment adviser. Nothing in the Comptroller's regulations still applicable precludes the Committee from exercising its responsibilities. Although Regulation 9, as originally promulgated, did not take account of the requirements of the Investment Company Act, all provisions of Regulation 9 inconsistent with that Act were superseded by the Comptroller's written approval of the Account in the form necessary to satisfy the Securities and Exchange Commission. The Bank's majority control for purposes of day-to-day management of the fund is a false problem. The real issue is whether exemptions allowing an extra director on the Bank side will undercut the Committee's watchdog role in areas of potential conflict of interest.

Section 6(c) of the Investment Company Act empowers the Commission to grant exemptions from the Act, or any rule or regulation adopted under it, ". . . if and to the extent that such exemption is necessary or appropriate in

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[13] Notwithstanding the provisions of §§ 10(a) and 10(b)(2), § 10(d) permits all but one of the directors of certain types of "no-load" funds to be affiliated with the investment adviser if certain conditions are met. 15 U.S.C. § 80a-10(d). To qualify for the exception under § 10(d), the Bank would have had to register as an investment adviser, principally involved in that business. An exemption from this condition was denied.

the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions" of the Act. 15 U.S.C. § 80a-6(c). The Commission has exercised this authority to exempt persons not within the intent of the Act and generally to adjust its provisions to take account of special situations not foreseen when the Act was drafted. *Transit Investment Corporation,* 28 S.E.C. 10, 16 (1948); *The Atlantic Coast Line Company,* 11 S.E.C. 661, 666-67 (1942).

In granting the exemptions at issue, the Commission first observed that the Account differs on the one hand from the bank-dominated securities affiliates of the twenties whose abuses inspired § 10[14] and, on the other, from open-end investment companies (mutual funds) not subject to the supervision of the Comptroller. For these reasons, it was appropriate to consider whether a bank-sponsored fund was a type of investment company requiring the standard measure of unaffiliated directors or whether exemptions were justified by its novel characteristics. The Commission concluded that the risks of conflict of interest would be adequately controlled by the provisions of the Investment Company Act still applicable, supplemented by the Comptroller's regulations, and that the exemptions would permit the establishment of a desired new investment

[14] Securities affiliates were organized by banks to evade the prohibition against investment of bank funds in common stocks. The affiliates, usually closed-end investment companies, often took loans from the sponsor banks, secured by the stock held by the affiliate, and then used the borrowed funds to trade or invest in the bank's stock or in other securities in which the bank had an interest. The affiliates also made loans of investment company funds to the bank. Shareholders of the affiliate and depositors of the bank were both on the losing end of these arrangements. The abuses were detailed in a comprehensive study submitted to Congress by the Commission prior to the adoption of the Glass-Steagall Act. *Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission,* Pt. 1, H.R. Doc. No. 707, 75th Cong., 3d Sess. 94 (1938).

medium, still subject to all the safeguards necessary for the protection of its investors.

The conflict of interest problems created by bank affiliation with investment companies are of a different order when the fund is sponsored by the bank. In the proceedings below, the Commission considered four danger zones, previously cited by former Chairman William L. Cary in testimony before Congress recommending regulation of collective investment funds,[15] and urged by the NASD as reasons for denying the exemptions.

A. *Retention of substantial cash deposits for the Account in the Bank*

The Commission discounted the danger that the Bank might retain an unwarranted portion of the Account's assets in cash in order to earn money for the Bank, stating that the temptation to leave funds uninvested would be contrary to the Account's stated policy of investment for long-term growth of capital and income, and to the Bank's interest in having the fund's assets increase. The interest in increasing the assets in the fund dictates not only that funds already held be invested in growth securities, but also, as we have seen, creates pressure to increase the number of participants. The undisputed fact that the Account will compete with the mutual fund industry can be expected to inhibit retention of its income-producing assets in the form of lopsided cash deposits. There is an important point of convergence between the interests of the Bank directors *qua* commercial bankers and their interest in the success of an investment medium offered as part of the Bank's services, a convergence not present when Bank personnel serve as directors of independent investment companies.

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[15] *Hearing on Common Trust Funds—Overlapping Responsibility and Conflict in Regulation, Before a Subcommittee of the House Committee on Government Operations* [Hereinafter *Hearing on Common Trust Funds*], 89th Cong., 1st Sess. 11-12 (1963).

The Comptroller's regulations, moreover, state that funds held in a fiduciary capacity by banks shall not be held uninvested or undistributed for a period longer than is reasonable for the proper management of the particular account. 12 C.F.R. § 9.10(a). Observance of this regulation is policed through examinations of bank trust departments which occur at least three times in every two years. 12 U.S.C. § 481. The Commission reasonably concluded that the Bank's interest in holding the Account's assets in cash was offset by this combination of the carrot and the stick.

B. *Use of Account investments to shore up Bank loans*

Considered under § 16 of the Glass-Steagall Act was the danger that the Bank might make unsound loans to shore up companies in which it had made investments for the Account. From the standpoint of the Investment Company Act, the risk is that the Bank will make bad investments for the Account to shore up unsound loans. In a letter to the Senate Committee on Banking and Currency, Chairman William McChesney Martin of the Federal Reserve Board explained why this area of risk was not regarded as significant.

> For many years banks have participated in the management of employee-benefit funds and other fiduciary accounts that hold stocks and other securities in an aggregate amount far exceeding those held by the entire mutual fund industry. The examinations conducted by bank supervisory agencies have disclosed practically no such misuse by banks of their investment advisory and management functions. In the case of managing agency funds, an additional safeguard is the prophylactic restrictions and requirements of the Investment Company Act of 1940, particularly publicity of the financial transactions of registered investment companies, which almost inevitably would

expose such malfeasance. A further deterrent would be the adverse impact on a collective fund's performance—its comparative financial record—if any of its resources were used to make unprofitable investments; the detrimental effect on sales of participations might outweigh any benefits the bank could reasonably expect from its breach of fiduciary duty.[16]

In addition to taking note of the Comptroller's supervision of investments, the Commission cited its own supervision of transactions involving a joint arrangement between the Bank acting as a principal and the Account under the insider provision of § 17(d) of the Act, 15 U.S.C. § 80a-17(d),[17] and concluded that the margin for misconduct of this sort was narrow.

C. *Purchase by the Account of securities underwritten by the Bank*

The danger that the Account's funds might be used to promote the Bank's investment banking business is relevant generally to the exemption from § 10(c) and specifically to the exemption from § 10(b)(3). Section 10(b)(3) would have required that a majority of the directors of the Account be unaffiliated with an investment banker. The Bank is in the investment banking business to the extent that it participates in syndicates which underwrite debt securities of governmental authorities.

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[16] Letter dated December 14, 1967, from William McC. Martin, Jr., Chairman, Federal Reserve Board, to Senate Committee on Banking and Currency, in *Hearings Before the Senate Banking and Currency Committee on Amendment No. 438 to S. 1659*, 90th Cong., 1st Sess. 1223-26 (1968).

[17] Shoring up loans or acquiring banking business in connection with the purchase of stock for the fund may be such a joint transaction. Note, *Commingled Trust Funds and Variable Annuities: Uniform Federal Regulation of Investment Funds Operated by Banks and Insurance Companies*, 82 HARV. L.REV. 435, 451 (1968).

I concur in the Commission's judgment that there is no basis for concern that the Bank can or will use the Account to further its limited investment banking business. The Account is primarily a stock fund. It is not permitted to purchase any securities from the Bank, 15 U.S.C. § 80a-17(a), and cannot purchase government securities from another member of a syndicate where the Bank participates as principal underwriter. 15 U.S.C. § 80a-10(f). The Commission conditioned the exemption by prohibiting purchases from syndicate members even after the syndicate has terminated but the members hold unsold allotments.

D. *Allocation of brokerage to existing or potential Bank customers*

Former Chairman Cary observed that banks often distribute brokerage to those brokers with whom the Bank has or seeks reciprocal dealings, and that this may be contrary to the best interests of the Account's investors. This is one breed of the "bird-dog" problem presented when bankers direct investment business toward companies whose banking business they desire in return. Such a practice would, of course, depart from the brokerage policy set forth in the prospectus. The Bank's stated objective in placing orders is to obtain the most favorable prices and execution of orders and, secondarily, to deal with brokers and dealers who provide the Bank as investment adviser with supplementary research and statistical information or market quotations.

Reliance on the Bank's representations is not wholly satisfying. Allocation of brokerage for the Bank's benefit is a subtler form of self-dealing than questionable purchases of securities or maintenance of an undue cash balance, and one less amenable to control through disclosure and supervision by the agencies. Nonetheless, brokerage may be improperly distributed in the course of banks' already extensive securities purchases for the account of

customers, and it is appropriate to point out that Congress apparently did not consider this threat to be of critical significance when it exempted common trust funds from the Act entirely. See 15 U.S.C. § 80a-3(c)(3).

The Commission's orders do not rest upon a sanguine assumption that there are no conflicts of interest incident to bank-sponsored investment funds, but rather proceed from a showing that the dangers are significantly different from those involved in other types of bank-investment company affiliations. Because the Bank earns only a regulated fiduciary charge tied to the amount of the Account's assets, the Bank-affiliated directors' interest in attracting more customers coincides with the interests of investors and to some degree counteracts the incentive to hold the fund's assets in the form of commercial deposits. The restrictions upon Bank underwriting and Bank transactions with the Account make it unlikely that the Bank can profit by using the fund to unload or backstop its bad or indifferent investments, a major function of the bank-dominated securities affiliates of the twenties. To the extent that such hazards as improper brokerage allocation remain, the Commission could reasonably have concluded that two independent directors would perform adequately as watchdogs, with the enforcement powers of the Comptroller adding extra teeth.

Finally, the NASD claims that the Commission made an expedient bargain in granting the exemptions in order to head off legislation to exempt bank-sponsored funds from the securities laws. It is true that the Commission's assertion of jurisdiction over such funds generated legislative proposals, along with some friction between agencies of the Executive;[18] but I view the decision differently. Taking due account of the reduced potential for conflicts of interest in bank-sponsored funds and the near-complete

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[18] *Hearing on Common Trust Funds, supra,* n. 15 at 2-3 and 161-64.

coverage of the securities laws, the Commission determined that the supervision of the Comptroller would compensate for the absence of an independent tie-breaker on the Committee of the Account. This was a fair trade.

IV

Standing

A. *Standing of the Investment Company Institute*

The ICI claims standing to challenge competition from banks on the ground that the Comptroller has authorized a competitive activity specifically prohibited by Congress in the Glass-Steagall Act. *Cf. Baker, Watts & Co.* v. *Saxon*, 261 F.Supp. 247 (D.D.C. 1966), *affirmed sub nom. Port of New York Authority* v. *Baker, Watts & Co.*, 129 U.S.App.D.C. 173, 392 F.2d 497 (1968); *Saxon* v. *Georgia Assn. of Ins. Agents*, 399 F.2d 1010 (5th Cir. 1968).

As a general rule, competitors lack standing to challenge competition created or enhanced by governmental action, even if it is illegal, unless they can claim the benefit of an implied or express statutory aid to standing. *Pennsylvania Railroad Co.* v. *Dillon*, 118 U.S.App.D.C. 257, 335 F.2d 292, *cert. denied sub nom. American S.S. Co.* v. *United States*, 379 U.S. 945 (1964). The Glass-Steagall Act was not intended by Congress to protect mutual funds from competition from banks, so they do not have standing as intended beneficiaries; and the Act contains no aggrieved party provision. *Contrast Hardin* v. *Kentucky Utilities*, 390 U.S. 1 (1968); *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940). The District Court held, however, that the ICI was an implied, though not an intended beneficiary of the Glass-Steagall Act, and granted it standing to sue as a private attorney general to enforce the separation between commercial banking and securities dealing, despite the absence of an aggrieved party provision to support that role.

We are all agreed that this holding is exceptional, but so is this case. While the majority concludes from the cases that there is no satisfactory authority for standing, I find in those cases no reason to deny standing, and good reason to grant it. First, the authorities for the rule denying competitors standing to challenge unlawful competition are inapposite. Second, the basic justification for entertaining competitors' suits to challenge administrative action as statutory aggrieved parties, intended beneficiaries, or licensees is to vindicate a public interest, and not a private right. The absence of a statutory aid to standing in this case is adventitious, and I would grant appellants standing to assert the public interest without it.

1. *Competitors' standing to challenge unlawful competition without a statutory aid to standing*

Analysis of suits by competitors confirms the Supreme Court's observation that "the various rules of standing applied by federal courts have not been developed in the abstract. Rather, they have been fashioned with specific reference to the status asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated." *Flast* v. *Cohen*, 392 U.S. 83, 101 (1968). The general rule denying standing to competitors who can claim no statutory aid to standing is derived from two types of cases in which their interest in attacking allegedly unlawful competition has not been found reasonably proportionate to the burden on governmental agencies of defending against such suits. In one class of cases, privately owned utilities have been denied standing to challenge legislative public power programs. *See e.g., Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938); *Tennessee Electric Power Co.* v. *T.V.A.*, 306 U.S. 118 (1933); *Kansas City Power & Light* v. *McKay*, 98 U.S.App.D.C. 273, 225 F.2d 925, *cert. denied*, 350 U.S. 884 (1955). These cases draw much of their vitality from considerations of separation of powers and the

doctrine "that a person may not maintain a suit to enjoin the use of Government funds, even if such use is claimed to be in violation of law." In suits of this nature, "[t]he fact that the plaintiff is suffering an economic detriment from competition assisted by a loan or grant of Government funds, does not give him standing to sue." *Baker, Watts & Co.* v. *Saxon,* 261 F.Supp. at 249. *Cf. Saxon* v. *Georgia Assn. of Ins. Agents,* 399 F.2d at 1020-21 (concurring opinion).

There are similarly sound policy reasons why competitive injury does not confer standing to challenge administrative decisions affording some incidental aid to another competitor or group of competitors in an industry. Minor or speculative economic injury is not worth burdening the agencies and the courts with skirmishes among businesses over comparative advantages resulting from allegedly illegal agency action. *See Pennsylvania Railroad Co.* v. *Dillon,* 118 U.S.App.D.C. at 262, 335 F.2d at 297.

These, then, are the considerations underlying the many opinions which deny standing with the homily that competition is our economic norm. To acknowledge that cases denying standing to competitors are governed by (1) considerations of separation of powers, and (2) a desire to limit actions against the government, rather than by rigid abstract rules, seems to me only to do justice to the subtleties of standing as an element of justiciability. In suits by competitors, the nature of the claim is plainly relevant to the status of the economic interest asserted as a basis for standing. Here the ICI does not challenge the constitutional propriety of legislation or government spending. It does not ask this court to invoke due process or substantial evidence standards to afford it a remedy for marginal injury from an illegal administrative action. It points out, instead, that national banks operated under a regime of enumerated powers and prohibitions carefully laid down by Congress, and asks us to decide whether the competition authorized by the Comptroller violates specific

provisions of the banking laws, one of which carries criminal penalties for bank entry into the securities business. 12 U.S.C. § 378.

In these circumstances, to put the ICI out of court with the incantation that competition is our economic norm is insupportable in law and fact. No case stands for the rule that authorization of novel and prohibited—even criminal—business activity by administrative agencies is part of the rough-and-tumble of a competitive market. And in point of fact, toe-to-toe competition between mutual funds and commercial banks has never been the norm. The Comptroller's action introduces a powerful new element into a market previously closed to commercial banks by the rulings of the Federal Reserve Board, enforcing the same prohibitions now largely committed to the supervision of the Comptroller. This case falls outside the authorities for the general rule that competitors lack standing to challenge illegal competition.

We are not locked into conventional concepts of unfair competition in assessing a competitor's interest for purposes of standing. *Cf.* Jaffe, *Standing To Secure Judicial Review: Private Actions*, 75 HARV.L.REV. 255, 265-66 (1961). It would not be far-fetched to conclude that competition illegally authorized by an agency which has allegedly ignored statutory prohibitions is unfair. But while there is arguably a private interest meriting protection here, it is plain that the overriding interest in enforcement of the Glass-Steagall Act is a public one. The question is whether the ICI may assert the public interest without a statutory aid to standing.

2. *Competitors' standing to challenge unlawful competition with a statutory aid to standing*

(a) Aggrieved party statutes

Since the decision in *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940), competitors have been granted standing to challenge administrative action under statutory aggrieved party provisions despite the fact that the statute does not require that their competitive interests be given weight by the agency. Competitors need not even be members of the industry subject to a specific regulatory statute to sue under it, so long as they can show aggrievement by administrative action pursuant to the statute. *See Clarksburg Publishing Co.* v. *F.C.C.*, 96 U.S.App. D.C. 211, 225 F.2d 511 (1955); *Philco Corp.* v. *F.C.C.*, 103 U.S.App.D.C. 278, 257 F.2d 656 (1958), *cert. denied*, 358 U.S. 946 (1959). Competitors whose interests and injuries are not legally protected or even immediately relevant to a regulatory jurisdiction are given standing as private attorneys general to represent the public interest in the proper administration of a regulatory scheme. *Scripps-Howard Radio, Inc.* v. *F.C.C.*, 316 U.S. 4, 14 (1942); *Associated Industries* v. *Ickes*, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

(b) Intended beneficiaries

Long before *Sanders*, the Supreme Court had held that competitors have standing to challenge unlawful competition when they can show that a statute was intended to afford some protection to their economic interests. *The Chicago Junction Case*, 264 U.S. 258 (1924). The *Chicago Junction* theory is the only logical support for cases holding that a license, grant, or other property interest makes some competitors more worthy plaintiffs than others. The significance of a license for standing is not its conventional status as a property right but the fact that licensing may

indicate a legislative intent to limit competition in a market by regulating entry. Licensees may be intended beneficiaries entitled to rely on a regulatory scheme, with standing to enforce it. *See Frost* v. *Corporation Comm'n*, 278 U.S. 515 (1929) (Dissenting opinions of Justices Brandeis and Stone).

In *Chicago* v. *Atchison, Topeka & Santa Fe Ry.*, 357 U.S. 77 (1958), the Supreme Court granted standing to a motor carrier to challenge the operation of a new carrier which had not obtained a permit required by statute on the ground that the first carrier was adversely affected and contended that the competition was prohibited by a valid city ordinance. 357 U.S. at 83. The holding on standing does not even refer to the fact that the plaintiff carrier had a license; the point was that one party was lawfully in business and one allegedly was not. In such cases, the limitation on the number of entrants in a market is not really intended to benefit a licensee, but to assure to the public an adequate level of services from economically viable enterprises. The licensee-plaintiff is vindicating a public interest. His private interest is his reliance on the rules protecting the public.

Since the enactment of aggrieved party provisions giving competitors standing in most regulated industries, the intended beneficiary theory has conferred standing in exceptional cases where there is no express statutory aid to standing, notably in an action against the TVA and in the spate of suits against the Comptroller. In *Hardin* v. *Kentucky Utilities*, 390 U.S. 1 (1968), the Supreme Court granted standing to a private utility to adjudicate a dispute over statutory area limitations on the expansion of TVA, a comparatively clear case of market allocation by the legislature.

Competitors in regulated industries have been granted standing as intended beneficiaries of a regulatory scheme where the statute (1) requires equal treatment of competi-

tors (*Chicago Junction*), (2) regulates the number of entrants into a market (*Chicago* v. *Atchison, Topeka & Santa Fe*), and (3) allocates markets among competitors (*Hardin*). In each case the legislature has concluded that the public interest in an adequate level of efficient services is furthered by some restriction on competition. When private parties sue to enforce those restrictions, they are necessarily asserting a distinct public interest more important than their own.

3. *Competitors' standing to sue the Comptroller*

The banking laws affect competition by keeping banks out of specified business activities, but the limitation of competition in certain markets is a by-product of prohibitions whose overriding purpose is to protect the banks and their depositors' fortunes. Two courts have nonetheless granted standing to a group of insurance agents and a data processing firm to challenge rulings of the Comptroller authorizing banks to enter their bailiwicks on the ground that certain provisions of the banking laws indicate an intent to protect their interests. In *Saxon* v. *Georgia Assn. of Ins. Agents*, 399 F.2d 1010 (5th Cir. 1968), the majority held that § 92 of the National Bank Act, 12 U.S.C. § 92, permitting banks to act as insurance agents in cities of 5,000 inhabitants or less was intended to protect insurance agents in larger towns from bank competition. But it seems more likely that the sale of insurance was never an activity within the intent of the statutory provision granting banks "all such incidental powers as shall be necessary to carry on the business of banking," 12 U.S.C. § 24(7), and that the general ban on bank entry into the insurance business was qualified solely for the purpose of strengthening weak banks in small towns. The interest of insurance agents in *retaining* the implied prohibition in larger communities is unrelated to the intent of Congress in enacting it in the first place. 399 F.2d at 1019 (concurring opinion).

Similarly, in *The Wingate Corp.* v. *Industrial National Bank,* 408 F.2d 1147 (1st Cir. 1969), the plaintiff data processors argued that solicitation by banks of data processing business from the business community at large was not a power incidental to banking, and that recently enacted limitations on the data processing activities of bank service corporations, jointly formed by small banks to enable them to purchase computer equipment, were intended to protect independent data processing companies.[19] The First Circuit accepted this argument, relying heavily upon the fact that the National Society of Public Accountants had proposed the limiting amendment. But the fact that the organized accountants pressed for an explicit limitation does not mean it was designed to protect them. Enterprises that lobby for legislation are not necessarily transformed into intended beneficiaries if it passes.

I agree that the insurance agents and the data processors in these two cases did have standing, but I am not persuaded that the specific provisions relied upon by the courts were intended to create protected classes of competitors any more than the Glass-Steagall Act was intended to benefit mutual funds or investment bankers. *Cf. Baker, Watts & Co.* v. *Saxon,* 261 F.Supp. 247 (D.D.C. 1966), *aff'd sub nom. Port of New York Authority* v. *Baker, Watts & Co.,* 119 U.S.App.D.C. 173, 392 F.2d 497 (1968). It is fruitless to look for an intent to protect these businesses from competition from banks in legislation designed to restrict or prohibit bank activities for reasons having nothing to do with competition. The critical question of congressional intent is this: Did Congress intend to immunize rulings of the Comptroller from judicial review? This is the critical question because substantial immunity is the consequence of denying standing to competitors. They are the only parties likely to challenge the authorization of prohibited bank activity. *Cf. Office of Communication of the United*

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[19] *Contra, Assoc. of Data Processing Serv. Organ., Inc.* v. *Camp,* 406 F.2d 837, *cert. granted,* 37 U.S.L.W. 3489 (June 23, 1969).

Church of Christ v. *F.C.C.*, 123 U.S.App.D.C. 328, 335, 359 F.2d 994, 1001 (1966). The intended beneficiaries of the banking laws, if the class is narrower than the public, are bank customers who have no immediate and compelling interest in litigation to further long-term sound banking.

It is fortuitous that there is no aid to standing for these plaintiffs. If underwriters, insurance agents, data processors, and securities dealers are right that banks are prohibited by law from entering their businesses, Congress would never have foreseen that administrative rulings under the banking laws would substantially affect their economic interests. Judging from the purpose and pattern of the banking laws, the question of aggrieved non-bank competitors never came up.

This conclusion finds support in the fact that when Congress anticipated competition problems, it dealt with them in specific terms, notably in provisions of the banking laws equalizing the legal conditions of competition between state and national banks. In dozens of cases, state banks, and recently a state banking agency have had standing to challenge the authorization of new branches of national banks in violation of the statutory limitation of national bank branching to areas where state branches are permitted. 12 U.S.C. § 36(c). *See e.g.*, *Whitney Nat. Bank* v. *Bank of New Orleans & Trust Co.*, 116 U.S.App.D.C. 285, 323 F.2d 290 (1963), *rev'd on other grounds*, 379 U.S. 411 (1965); *Nuesse* v. *Camp*, 128 U.S.App.D.C. 172, 385 F.2d 694 (1967).[20] Thus, under the usual rules of standing, a state bank can enjoin illegal branching by national banks, but there is no party who can sue to enforce the separation between commercial banking and the securities business. Given the relative triviality of the threat to the banking

[20] Section 92a of the Federal Reserve Act, 12 U.S.C. § 92a, authorizing national banks to act in any other fiduciary capacity open to state banks in the locality, discussed, *supra*, pp. 8-9, indicates a similar concern for equalizing the ground rules of competition between state and national banks.

system posed by outlaw branch banks as compared to the menace of illegal securities dealing, this result is too bizarre to have been intended by Congress.

Disappointed license applicants can call the Federal Communications Commission to account for its decisions in the name of the public. Regulated carriers and state banks may challenge unlawful competition because courts have inferred some protection to their interest from a regulatory scheme. In both cases, competitors' suits are furthering the public interest at stake in the rules. All that is missing in this case is a "logical nexus" between the competitive interest of the mutual fund industry and the aims of the banking laws. *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968). It is missing because Congress had more important interests in mind.

Principles of standing in competitors' suits have operated as rules of thumb to sort out proper plaintiffs and legal issues of competition deemed appropriate for judicial resolution. Both are present here. It is not disputed that the members of the ICI are aggrieved by the Comptroller's ruling. Bank-sponsored diversified investment funds open to $10,000 customers will compete for the cream of the market now cornered by the mutual funds. The ICI presents a question of statutory construction to define the boundaries of official authority, a type of question well within the traditional competence of courts of law. It is the only party likely to assert the public interest in observance of the banking laws by the agency responsible for enforcing them. In the exceptional circumstances of this case, I would grant the ICI standing to vindicate the public interest despite the absence of a statutory aid to standing.[21]

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[21] The commentators agree that a conventional "legally protected interest" or statutory aid to standing should not be required in all cases. Professor Davis has long maintained that § 10 of the Administrative Procedure Act, 5 U.S.C. § 701 (Supp. II 1965-66), accords a right of review to any person aggrieved in fact by administrative action. 3 K. C. Davis, ADMINISTRATIVE LAW TREATISE § 22.02 (1958); *Standing: Taxpayers and Others*, 35 CHI.L.REV.

B. *Standing of the National Association of Securities Dealers*

The NASD claims standing to seek judicial review under § 80a-42(a) of the Investment Company Act, which accords a right of review to "[a]ny person or party aggrieved by an order issued by the Commission . . . ." 15 U.S.C. § 80a-42(a). It relies principally on the case of *F.C.C.* v. *Sanders Bros Radio Station,* 309 U.S. 470 (1940), to support its standing to sue as a private attorney general to vindicate the public interest in the proper enforcement of the Investment Company Act. This standing issue is settled by *Sanders.* There is no requirement that a plaintiff establish a legally protected private interest to sue under "party aggrieved" statutes. *Office of Communication of United Church of Christ* v. *F.C.C.,* 123 U.S.App.D.C. at 335, 359 F.2d at 1001. The only question is whether the NASD is

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601, 619 (1968). Aggrievement in fact is all that is needed to create a case or controversy in the constitutional sense. There is some support for Professor Davis' interpretation in the legislative history of § 10, but most courts, including this circuit, have rejected it. *Kansas City Power & Light* v. *McKay,* 96 U.S.App. D.C. 273, 225 F.2d 924, *cert. denied,* 350 U.S. 884 (1955).

Professor Jaffe views the private attorney general theory grafted on to aggrieved party provisions as a variant of the common law public action, rooted in English and American state law. If a party is suing as a private prosecutor, Professor Jaffe regards his individual interest as irrelevant, but in such cases, "judicial discretion in terms of the size, urgency, and clarity of the issue at stake" should be exercised in the decision to take jurisdiction. Jaffe, *Standing to Secure Judicial Review: Private Actions,* 75 HARV.L.REV. at 286-87.

The theory that standing may be accorded as a matter of discretion when the plaintiff is aggrieved in fact combines the two commentators' approaches. *Curran* v. *Clifford,* No. 21040 (D.C. Cir., decided Dec. 27, 1968), *opinion vacated, petition for rehearing en banc granted* April 3, 1969. These approaches would support a finding of standing to challenge administrative action where (1) the plaintiff is aggrieved, or (2) the question presented is important, urgent and susceptible of judicial resolution, or (3) both conditions are present.

aggrieved by the Commission's orders granting the exemptions from the Act to the Bank.

The NASD represents about 3,700 registered brokers or securities dealers. Most of its members sell shares in mutual funds to investors and are compensated by sales commissions from the "load" charged by the funds. The Bank's commingled investment Account and similar bank-sponsored funds sure to follow[22] are an addition to the group of "no-load" funds whose shares are not sold at a commission by NASD members. No one denies that bank-sponsored collective investment funds will provide substantial competition to both "load" and "no-load" mutual funds. Limitation of sale of participations to customers with a minimum of $10,000 to invest does not narrow the area of competitive overlap enough to make probable injury insubstantial. Surveys indicate that individual sales of $10,000 or more have accounted for about half the mutual fund industry's total dollar sales.[23] NASD members stand to lose commissions earned from the cream of the business. This is enough to show that they are aggrieved parties under § 80a-42(a).

It is clear, moreover, that the NASD is aggrieved as a result of the Commissioner's orders. Analysis of the legal problems in establishing the Account in conformity with the banking laws confirms the Bank's concession that without the exemptions, it would be "effectively precluded"

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[22] Speaking of its exemption decision, the Commission has stated: "A pattern has thus been set which other banks may follow if they see fit." *Hearings on S. 2704 Before a Subcommittee of the Senate Committee on Banking and Currency*, 89th Cong., 2d Sess. 138. At the hearings, the American Bankers Association and individual banks demonstrated great interest in commingled accounts. *Ibid.* at 31-61.

[23] See testimony of an industry representative in *Hearings on S. 2704 Before a Subcommittee of the House Committee on Banking and Currency*, *supra*, n. 22 at 96.

from operating the Account. Both conditions of standing to sue under the aggrieved party provision are met.

For these reasons, I join in the decision of the court.

BURGER, *Circuit Judge*, concurring:* Although I am unable to join in the rationale underlying Judge Bazelon's basis for standing of Appellees, nonetheless I am prepared to agree with the result in order to make a majority holding for review of the merits of a subject of such importance. I do so in order to reach consideration of the merits for such aid as some examination at our level may be useful to further judicial review.

(1)

As I see it, there are three generally accepted theories of standing which guide the courts in ascertaining whether a plaintiff is the appropriate "party seeking to get his complaint before a federal court." *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968). The first emerges from those cases involving a statutorily defined basis for standing. *See, e.g., Scripps-Howard Radio, Inc.* v. *F.C.C.*, 316 U.S. 4 (1942); *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940). The second evolves from those cases where the plaintiff holds a public license, grant, or recognized property interest which supports his assertion of litigable rights. *See, e.g., Frost* v. *Corporation Com'n*, 278 U.S. 515 (1929); *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 116 U.S. App. D.C. 285, 323 F.2d 290 (1963), *rev'd on other grounds*, 379 U.S. 411 (1965). A third theory of standing centers around a finding of intended "statutory protection" which has been bestowed upon the plaintiff thereby entitling him to sue in order to preserve the interests which the statutory scheme has found to be worthy of

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*Consistent with the views herein expressed which are directed to *First Nat'l City Bank* v. *I.C.I.*, No. 21,661, I concur in Judge Bazelon's finding of standing as respects *NASD* v. *SEC*, No. 20,164 and join in the disposition on the merits in that case.

protection. This third concept of standing supported the development of a less easily identifiable strain of decisions focusing on a theory of "unlawful competition."

The "unlawful competition" theory as a basis for standing would seem to have two distinct definitional interpretations: (1) "to compete in any manner, whether legal or illegal techniques are utilized, is 'unlawful competition'"; (2) "to engage in non-prohibited competition by utilizing techniques or engaging in activities which are in themself illegal is 'unlawful competition'." Under the former interpretation, either no one may enter the competition in a given kind or area of endeavor or the particular party seeking to enter the competition has been prohibited from doing so in order to protect those parties already pursuing the activity under some grant, franchise or license. Under the latter interpretation, competition per se is not proscribed but the very conduct which constitutes the competition is in itself illegal. In my view, the first interpretation is a valid one which necessarily emerges from the recognized desire to "protect" extant interests and can properly form the basis for a claim of standing. The second finds no support in a close analysis of the myriad cases reviewing the prerequisites to standing, is a misinterpretation of the conceptual genesis of the theory of unlawful competition, and cannot support a claim of standing.

An illustration of this can be seen in the distinction drawn in the recent *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 5-6 (1968) case. There, the Supreme Court explained that:

> [T]he economic injury which results from *lawful competition* cannot, in and of itself, confer standing on the injured business to question the *legality* of any aspect of its competitor's *operations* (emphasis added).

The reasonable corollary of this proposition would be that a party could question the legality of its competitor's oper-

ations if, independently, it could demonstrate that the competition per se was "unlawful." In its subsequent analysis,[1] the Court made clear that by utilizing the term "unlawful competition" it meant to preserve the operative distinction between an evaluation of the lawfulness of the competition itself and an evaluation of the legality of the particular conduct which produces the competition.[2]

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[1] In the language following the above-quoted statement, the Court continued:

> But competitive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury. In contrast, it has been the rule at least since the *Chicago Junction Case*, 264 U.S. 258 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive inerest, the injured competitor has standing to require compliance with that provision.

390 U.S. at 6.

[2] This court recently recognized this distinction in *Pennsylvania R.R. Co.* v. *Dillon*, 118 U.S. App. D.C. 257, 259-60, 335 F.2d 292, 294-95, *cert. denied sub nom. American Hawaiian S.S. Co.* v. *Dillon*, 379 U.S. 945 (1964):

> "Legal wrong," as we have only recently noted, is the invasion of a legally protected right. *See Gonzalez* v. *Freeman*, *supra*, 117 U.S. App. D.C. at 186 n. 6, 334 F.2d at 576 n. 6. Thus, in order to make out a claim of "legal wrong" under Administrative Procedure Act § 10(a), appellants must assert some legally protected right to be free of the competition . . . . This court has very recently spoken on this aspect of standing. When "Congress has not given them any such standing by express or implied provision of statute * * *, mere economic competition made possible by governmental action (even if allegedly illegal) does not give standing to sue in the courts to restrain such action. [citations omitted] For purposes of standing in this case, the sufficiency of appellants' allegation of "legal wrong" thus depend upon congressional intent to bestow upon them a legal right to protection from such competition.

To resolve the standing question the Court did not find it necessary to inquire into the legality or illegality of the implementing operations which the Tennessee Valley Authority was to utilize to enter the market for selling electricity in the areas in question.[3] All that was necessary was a finding that "one of the primary purposes of the area limitations in § 15d of the [Tennessee Valley Authority Act of 1933 as amended] was to protect private utilities from TVA competition." *Id.* at 6. An area limitation, of course, lends itself to ready interpretation, hence competition per se by TVA would be "unlawful" if TVA had in fact encroached upon the market area which had been reserved for the local utility companies and from which TVA's entry had been prohibited. Because Kentucky Utilities Co. was a member of the class so meant to be protected, it had standing to litigate to obtain an adjudication of its substantive rights under the protective statutory scheme, and "no explicit statutory provision [was] necessary to confer standing." *Id.* at 7 (footnote omitted).

The rationale underlying this finding of standing is that Congress affirmatively intended Kentucky Utilities to be protected from TVA competition. In essence, it was a clearly identifiable beneficiary of a statutory grant of protection, and as such, it was entitled to sue to protect the rights conferred. Whether TVA's operations which led to the competition were in themselves legal or illegal was irrelevant to the determination of Kentucky Utilities' standing.

In addition to these three categories of standing cases, some hybrid variations—some of which are valid, others not—have emerged. They include: (1) the *Flast* v. *Cohen*,

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[3] Significantly, the Court finally concluded that TVA "could . . . properly make its low-cost power available to consumers in this . . . area . . . ." 390 U.S. at 5. Therefore, the Court's resolution of the standing issue cannot be evaluated as a rationalization prompted by its determination that Kentucky Utilities Co.'s substantive rights had been violated.

supra, provision for taxpayer challenges of federal expenditures allegedly in violation of specific constitutional limitation; (2) the unique application of the "consumer aggrievement" concept articulated in *Office of Communication of United Church of Christ* v. *F.C.C.*, 123 U.S. App. D.C. 328, 359 F.2d 994 (1966), pursuant to the "person aggrieved" provision of the Federal Communications Act, 47 U.S.C. 309(d) (1964); (3) the discretionary standing theory broached in *Curran* v. *Clifford*, No. 21,040 (D.C. Cir., Dec. 27, 1968), *opinion vacated, petition for rehearing en banc granted*, No. 21,040 (D.C. Cir., April 3, 1969); (4) the concept that "aggrievement in fact" is sufficient to give a party standing to challenge agency action under § 10 of the Administrative Procedure Act; (5) the improper utilization of the "unlawful competition" theory discussed *supra* and employed by some courts which have granted standing in cases involving recent promulgations by the Comptroller of the Currency.[4]

(2)

Against this background we should examine Appellees' claim of standing in the present litigation. As set forth in the preceding opinion, Appellee-Institute is a national association representing 177 open-end management investment companies commonly designated as "mutual funds" and the 88 investment advisers and 78 principal underwriters of these funds. The mutual fund members of the Institute represent 94 percent of all such companies in the United States. The Institute membership also includes several investment advisers and principal underwriters of individual mutual funds which are individual Appellees in this suit.

The major basis for Appellees' claim of standing to challenge the Comptroller's regulations is that the entry of the

[4] For an extensive collection of the recent cases involving "unlawful competition" as a theory for challenging activity authorized by the Comptroller see *Saxon* v. *Georgia Assoc. of Independent Ins. Agents, Inc.*, 399 F.2d 1010, 1017 n. 6 (5th Cir. 1968). *See also* Judge Bazelon's opinion at pp. 30-34.

national banks into the so-called "mutual fund industry" would constitute "unlawful competition" which Appellees as representatives of the industry may challenge.[5] However, an analysis of the facts of this controversy illustrates Appellees' reliance on an incorrect interpretation of the concept of "unlawful competition." To perceive the faulty basis of the claims of Appellees, their precise contentions must be studied.

> Appellees are complaining of unauthorized administrative action creating a form of competition specifically prohibited by Congress in the Glass-Steagall Act. The challenged regulations authorize banks to engage in unlawful competition, permitting them to enter the mutual fund business and engage in *issuing, selling, distributing* and *underwriting securities* in violation of Section 16, 20, 21 and 32 of the Glass-Steagall Act. Appellees are not merely challenging a program of governmental assistance, financial or otherwise, to lawful competitors *whose competitive activities* have been specifically authorized by Congress.

Brief for Appellees 66 (emphasis added).

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[5] Appellees also assert that § 702(a) (Supp. II, 1967), embodies an independent and self-sufficient statutory basis for standing. I do not feel that the APA was meant to arrest the development of the law of standing as of the date of its passage:

> [W]e would certainly be prepared to hold in an appropriate case that one who complains of administrative action may find a remedy under the Act beyond the strict scope of judicial review recognized prior to its adoption . . . .

Kansas City Power & Light Co. v. *McKay*, 96 U.S. App. D.C. 273, 282, 225 F.2d 924, 933, *cert. denied*, 350 U.S. 884 (1955). Nevertheless, although the review provisions of the APA were not meant to retard the judicial development and adaptation of the law of standing, it does not establish an independent right to review absent judicially articulated notions of "legal wrong" of "adversely affected or aggrieved . . . within the meaning of any relevant statute." *See Pennsylvania R.R. Co.* v. *Dillon, supra*, n. 2.

Appellees then go on with sweeping contentions "that competitors have the right to challenge new competition, authorized by administrative action, which has been prohibited by statute."

* * *

> Furthermore, there is *no justification* for the gloss which Appellants attempt to put on *Hardin requiring a specific and express Congressional intent to protect particular plaintiffs in order to confer standing on them* to challenge regulations which create unlawful competition. The well-established rule, in this Court, the Supreme Court, and other courts, is directly to the contrary. *Where the effect of the statutory prohibition is to bar competition*, those subject to such illegal competition created by administrative regulation have the standing to challenge the regulation.

Brief for Appellees 66, 67, 73 (emphasis added).

Appellees have thus sought to shift the focus to the activity of the Bank and its alleged violation of the strictures of the Glass-Steagall Act; their burden is to establish their own status as intended statutory beneficiaries of a freedom from competition by national banks.

In a recent decision denying standing in a suit brought by the Association of Data Processing Service Organizations and Data Systems, Inc.[6] challenging allegedly improper national bank entrance into the data processing business, the Eighth Circuit made some cogent observations:

> Much of the confusion on standing seems to arise from the emphasis upon the issues to be adjudicated or

[6] Data Systems Inc. is a Minnesota corporation engaged in the data processing business. Association of Data Processing Organizations is an incorporated association domiciled in Pennsylvania whose members perform data processing services throughout the United States.

> upon the possible merits of the substantive claim rather than upon an examination of the status of the complaining plaintiff. *Whether or not a defendant is alleged to be engaged in illegal competition cannot by itself* determine a plaintiff's standing to complain. ... The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.
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> • • •
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> [I]t seems clear that an allegation of "illegal competition" is not the balancing determinant of a plaintiff's standing. The primary search must rest on whether the plaintiff's status is one which enjoys a private interest entitled to protection or one which the law recognizes to be of such legal significance to allow a party to act as a public representative for a public interest.

Association of Data Processing Service Organizations, Inc. v. *Camp*, No. 19,218 (8th Cir., Feb. 6, 1969) (citations omitted) (emphasis added).

That Court found that the plaintiffs were "competing in a non-regulatory field of free competition," they were not members of any class "designedly protected by statute," and they possessed no legal interest "recognized at law." *Id.* at 10. Accordingly, they had no standing to challenge the new rulings by the Comptroller which allowed the bank to offer these new services.

As previously indicated, the Glass-Steagall Act does not contain the familiar provisions which constitute an aid to standing in terms of allowing a "person aggrieved" to challenge administrative decisions or promulgations made pursuant to the Act. Nor can Appellees validly assert any "license, grant, or recognized property interest" entitling them to standing. It is equally clear that giving even the broadest reading of the legislative history embellishing the

Act will not support the conclusion that Congress meant to bestow upon Appellees any protection from competitive injury.[7] With these bases of standing foreclosed, Appellees necessarily turn to the inaccurate definition of "unlawful competition" which I find to be without support in an analysis of the "competition" cases.

For the most part the cases relied on by Appellees are readily distinguishable. In *American Trucking Assn,* 364 U.S. 1 (1960), the Court found a statutory purpose to protect "all modes of transportation" and the complaining party had the benefit of a specific "party in interest" aid to standing. Interstate Commerce Act, 49 U.S.C. § 305 (g). *Chicago* v. *Atchison, T. & S.F. Ry.*, 357 U.S. 77 (1958), involved a plaintiff which held a license, thereby entitling it to oppose another carrier's operation without obtaining a license. In *Frost, supra,* the Court found that a cotton gin licensee had a "property right" and could challenge the invasion of this right by another without a valid license. In *Whitney Nat'l. Bank, supra,* the Court allowed a state

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[7] *See* Judge Bazelon's opinion at p. 25. The thrust of the legislation, and the concern of the drafters, was to protect the banking public through the maintenance of a sound national banking system. Senator Bulkley, one of the managers of the bill, made it explicit in his remarks that the bill was not focused on protecting the investing public, much less the securities industry:

> [T]he purpose of this bill does not extend to safeguarding purchasers of securities as such. The purpose of this bill is to improve the operation of the Federal Reserve System and the banks which are members of it. The object of the inhibitions which I am discussing here is not primarily to protect the investing public, although that is a worthy purpose, but our field is to protect the operations of the banking system itself, and to protect the depositors and customers of the banks so that they shall have the service from national and State member banks which they are entitled to expect.

75 CONG. REC. 9913-14 (1932). *See also* Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 266 (1961).

bank to challenge the Comptroller's authorization of new branch banks from national bank competition. The *Georgia Insurance Ass'n* case, *supra*, involved a provision of the Glass-Steagall Act which evidenced an affirmative legislative intent to protect local insurance agents from the competition of national banks.

Some of the language in *Port of New York Authority*, *supra*, is more troublesome. There, a group of investment bankers challenged the Comptroller's authority under Glass-Steagall to permit national banks to distribute revenue bonds not backed by the taxing power of the public body issuing the bonds. In acknowledging standing for the investment bankers to pursue their challenge, the District Court explained:

> While no one may maintain a suit to restrain lawful competition merely because he is suffering an economic detriment, nevertheless, a person has a standing to complain against *illegal competition*, or *specifically, against competition on the part of a person who lacks the legal right or power to pursue the competitive activities*. In this respect this action is precisely parallel to cases in which a state bank has been permitted to maintain suit to restrain the Comptroller of the Currency from granting permission to a national bank to establish a branch that would compete with the plaintiff.

Id. at 248 (emphasis added).

It seems to me that the District Court gave undue weight to the claim of unlawful competition and in effect equated it with competition created by illegal *activities*. This made it possible to rely on the "branch banking cases" which are not really applicable, since those cases turn on the provisions of Glass-Steagall which limit branch banking of national banks specifically in order to protect state banks from the unrestricted competition of national banks. *See*,

Pennsylvania R.R. Co. v. *Dillon,* 118 U.S. App. D.C. 257, 335 F.2d 292, *cert. denied sub nom. American Hawaiian S.S. Co.* v. *Dillon,* 379 U.S. 945 (1964); *Whitney National Bank* v. *Bank of New Orleans & Trust Co.,* 116 U.S. App. D.C. 285, 323 F.2d 290 (1963), *rev'd on other grounds,* 379 U.S. 411 (1965).[8]

Appellees here pursue their associational livelihood in a securities marketing industry which thrives on competition in the quest for the investment dollar. The entry of the national bank commingled investment accounts into this competition admittedly adds a whole new category of competitors but it is fundamentally not different from the situation which arises, for example, when "gas stations" sell candy bars, soft drinks and other staples for which travellers have need. Nevertheless, before Appellees may sue to prevent bank competition which affects their private financial interests, they must establish that the Glass-Steagall Act contemplated that they were to be protected from this competition in their pursuits. Even assuming that the competing activity of the Appellant Bank may be otherwise violative of a provision of the Act, I can find no indication that the Act intended to afford protection to securities dealers generally. My position therefore is one of reservation amounting to virtual disbelief in any standing in Appellees.

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[8] In *Pennsylvania R.R. Co.* v. *Dillon,* we specifically noted this critical distinction:

> Appellants' reliance on *Whitney* [citation omitted] is also misplaced. There, this court held that certain state banks had standing to attempt to enjoin the Comptroller of the Currency from issuing to a national bank a Certificate of Authority allegedly in violation of federal banking statutes. The court found that federal statutes had guaranteed that state banks would be free of certain competition from national banks.

118 U.S. App. D.C. at 262 n. 6, 335 F.2d at 297 n. 6.

(3)

Persuasive arguments can be advanced that the pressure for someone with standing to challenge conduct in matters of large public interest is so great that irreconcilable abstractions and distortions have emerged to satisfy what are thought to be the needs. Quite often courts pursued a "bootstrap" or circular logic by initially analyzing the merits, in order that a finding of standing to challenge actions seems more palatable because the course has already found a possible encroachment of "rights" which it desires to review. To evaluate standing solely or even primarily on such visceral reactions does violence to the judicially created concepts of standing:

> The fundamental aspect of standing is that it focuses *on the party* seeking to get his complaint before a federal court *and not on the issues* he wishes to have adjudicated.

Flast, supra at 99 (emphasis added).[9]

Evaluating Appellees' qualifications as prospective litigants on behalf of their own private economic interests and the public's interests, it becomes evident that they are indeed adverse both as respects their actual prosecution of this litigation and in regard to their fundamental challenge to the Comptroller's authority to allow the national banks to engage in this type of securities activity. Their financial interest in these proceedings has been examined in the preceding opinion, and when this is coupled with authorita-

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[9] The *Flast* Court spoke in terms of the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." However, I suggest that the thrust of the "constitutional" reference was in relation to the ability to challenge the particular action—federal expenditures in sensitive constitutional areas—there involved and was not intended to retard the flexibility of sound concepts of standing when the plaintiff's assertions focus on non-constitutional violations in areas of administrative activity.

tive prognostications of impending financial harm to their interests if the Comptroller's regulations are allowed to stand,[10] it is obvious that there exists one cogent qualification of a challenger in the reasonable probability of factual aggrievement sufficient to insure the spirited adverseness necessary to judicial resolutions.

With this element satisfied, on this record the alternative to a grant of Appellees' claim to standing would be to effectively frustrate any challenge to the regulations in question.

(4)

Because of the factors discussed heretofore I am unable to set aside my grave doubts as to Appellees' standing to institute and maintain these suits. However, in the uncertain state of the law as to standing, there is something to be said on both sides of that question. I therefore resolve my doubts in favor of the Appellees and concur in the result of that portion of the foregoing opinion which holds that the Appellees have standing. I am influenced substantially, as I indicated at the outset, by the need for judicial examination of the important questions raised.

The record before us reflects that the Federal Reserve Board and other government agencies involved gave careful and comprehensive study to all aspects of this problem before taking the actions challenged by the mutual fund industry. Our review function is narrow and limited; it does not include the power to decide whether the public will be better served by one or the other modes of investing funds so as to achieve diversification, yield, safety or low cost. All that is the primary responsibility of the special

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[10] Indeed, the Comptroller himself predicted that in the next decade commercial banks operating under these regulations "might capture as much as two billion dollars of mutual fund business." *Hearings on H.R. 8499, 9410 before the Commerce and Finance Subcommittee of the House Committee on Interstate and Foreign Commerce*, 88 Cong., 2d Sess. p. 26 (1964).

regulatory bodies established by Congress for that purpose. On the face of the record there is, of course, nothing very startling about the decisions of the Comptroller, the Commission or of the Federal Reserve Board. In one form or another banks have been holding, managing and investing funds for customers for a long time. Indeed, when one considers the historical background it could be reasonably argued by banks that "investment trusts" and more recently "mutual funds" have invaded their domain. However, such arguments are of a kind which are for the regulatory agencies.

Here the Comptroller of the Currency, after study, has decided that the commingled managing agency account is a function which is authorized by law for banks and is in the public interest; the Securities and Exchange Commission and the Federal Reserve Board have approved. Other state and federal regulatory bodies are in accord. The regulatory bodies charged by Congress with these large responsibilities have construed the grant of power and with their accumulated expert experience have decided these issues. Their decisions are entitled to substantial deference and on this record I see no basis for disturbing their conclusions.

APPENDIX B

[Caption omitted]

Opinion of the United States District Court, District of Columbia

McGARRAGHY, District Judge.

This action is brought against the Comptroller of the Currency by the Investment Company Institute in its representative capacity of the open-end investment companies, investment advisers and principal underwriters which comprise its membership. The Investment Company Institute (hereinafter called the Institute) is an unincorporated association, having its principal place of business in the city, county and state of New York. The Institute is a national asociation, having as its members 177 open-end management investment companies and their 88 investment advisers and 78 principal underwriters. The open-end management investment companies which are members of the Institute have assets of $36 billion, representing about 94 percent of the assets of all such companies in the United States, and have approximately 3.5 million shareholders. The other plaintiffs in this action are several individual members of the Institute. They seek an injunction to restrain the Comptroller from authorizing national banks to collectively invest funds tendered to the bank as managing agent solely for investment purposes. They also pray for a declaratory judgment adjudicating the pertinent regulation promulgated by the Comptroller to be invalid.

The action is now before this court on cross motions for summary judgment, all of the parties agreeing that no factual issues exist and that the legal issues are ripe for disposition by summary proceedings.

It is first necessary to review and to delineate the factual background upon which the issues in this action arose and within which these motions are made. In September of 1962 the statutory authority to regulate the fiduciary activities of national banks was transferred from the Board

of Governors of the Federal Reserve System to the Comptroller of the Currency. Pub.L. 87-722, 76 Stat. 668, 12 U.S.C. § 92a. Pursuant to this authority, the Comptroller caused to be published in the Federal Register for February 5, 1963, a proposed revision of the fiduciary regulation, 12 C.F.R. § 9. In addition to the types of collective investment funds permitted under the prior regulation, this proposed revision provided that national banks were authorized to invest funds held in the capacity of managing agent in a collective investment account, 12 C.F.R. § 9.18(a) (3).[1] Moreover, the proposed revised regulation allowed the Comptroller to approve collective investment of such funds in manners other than those expressly provided by regulation 9, 12 C.F.R. § 9.18 (c) (5).[2]

The Comptroller invited national banks and other interested parties to submit comments pertaining to the proposed regulation. Plaintiff Institute, on behalf of its members, participated to the full degree permitted and submitted a statement in opposition to the proposed regulation. It premised its argument on the same basis that it is presenting before this court, namely, that the revised regulation would allegedly permit activity prohibited by 12 U.S.C. § 92a, and certain provisions of the Glass-Steagall Act, as amended, 12 U.S.C. §§ 24, 78, 377 and 378. Notwithstanding this opposition the final regulation was adopted by the Comptroller on April 5, 1963, and revised by minor modifications on February 5, 1964, 12 C.F.R. § 9.18.

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[1] (3) In a common trust fund, maintained by the bank exclusively for the collective investment and reinvestment of monies contributed thereto by the bank in its capacity as managing agent under a managing agency agreement expressly providing that such monies are received by the bank in trust.

[2] (5) In such other manner as shall be approved in writing by the Comptroller of the Currency.

Pursuant to the regulation, on May 10, 1965, the Comptroller approved a plan submitted by First National City Bank of New York (hereinafter referred to as the Bank) for the establishment and operation of a collective investment fund, called the Commingled Investment Account, under Regulation 9, 12 C.F.R. § 9. The plan as outlined by the Bank differed from the specifically enumerated collective investment funds authorized by the Comptroller's revised Regulation, but the Bank, pursuant to 12 C.F.R. § 9.18(c) (5) sought and obtained the Comptroller's written approval of the plan.

On April 20, 1966, the Bank registered its Commingled Investment Account with the Securities and Exchange Commission pursuant to the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.* as an open-end management investment company. On the same date, the Bank filed a registration statement with the Securities and Exchange Commission pursuant to the Securities Act of 1933, 15 U.S.C. § 77a *et seq.*, for the purpose of registering the participating interests or units to be issued by its Commingled Investment Account. The registration statement concerning those participating interests or units became effective on June 14, 1966. From that date the Bank has offered and sold to the public participating interests or units issued by the Commingled Investment Account by means of the prospectus for the First National City's Commingled Investment Account.

Before proceeding to the merits of this controversy, it is best at this time to specifically describe the operation of a mutual fund and the operation of the Commingled Investment Account (hereinafter referred to as the Account) so that a better understanding of the problem can be achieved.

Generally, "mutual funds" are open-end management companies engaged in the business of continuously issuing and offering for sale redeemable securities which repre-

sent an undivided interest in the fund's assets. Most mutual funds are corporate in form and the securities issued by them usually consist of capital stock. However, there are a number of mutal funds in a variety of non-corporate forms and the securities issued by some of them are variously denominated as beneficial interests, participating agreements, and the like. The proceeds from the sale of the securities issued by a mutual fund are invested in a portfolio of securities of various kinds, in accordance with the stated investment policy of the particular fund. Some funds invest primarily in securities offering current income; others concentrate on long-term growth securities; still others specialize in particular industries or classes of securities; and many offer various combinations of objectives. The shareholder in a mutual fund is entitled at any time to redeem his interest, usually at net asset value, or in a few instances upon payment of a charge. To facilitate this redemption privilege as well as to establish a price at which new shares are being offered, the value of a share in a mutual fund is calculated regularly, typically twice daily, on the basis of the market value of the securities held by the fund. Because of the continuous process of redemption, the mutual fund would be restricted and contracted in size, unless it continuously issued and offered new securities for sale.

Except in unique circumstances, virtually no shares in mutual funds are traded from one investor to another, and there is no significant trading market for such shares. In almost all cases, shareholders in mutual funds desiring to obtain cash for their shares redeem them with the issuing company. The securities issued by most mutual funds are offered to the public at a price which includes a sales commission or sales load. There are some mutual funds whose shares are sold with no sales commission being charged. These latter funds are frequently called "no load" mutual funds. The activities of mutual funds are under the control of a board of directors or board of trustees. Directors

or trustees are elected annually by the vote of a majority of the fund's outstanding voting securities.

Mutual funds usually contract an outside investment adviser for investment advice and other management services, and with a principal underwriter for the distribution of the fund's shares, pursuant to the statutory pattern established by the Investment Company Act of 1940, 15 U.S.C. § 80a-15. The investment adviser of a mutual fund furnishes advice to the fund with respect to its investment portfolio and the securities it should buy, hold, and sell. In some cases the adviser is empowered to purchase and sell securities for the fund. Some investment advisers also furnish supervisory and administrative services to the mutual fund. The investment adviser receives compensation for its services, usually in the form of a fee based on the total value of the assets being managed.

The principal underwriter of a mutual fund is engaged in the business of selling and distributing the securities issued by the fund to the investing public through brokers or dealers, or directly through the underwriter's own salesmen, or both. The principal underwriter either purchases the securities issued by the fund for resale or acts as agent for the fund in distributing the securities. Except in the case of a no-load fund, the principal underwriter receives a fee for its services, usually in the form of a portion of the sales commission included in the selling price of the shares issued by the mutual fund.

Mutual funds are required to be registered with the Securities and Exchange Commission pursuant to the Investment Company Act of 1940. The activities of the mutual funds and their relationship with affiliated persons and others are all subject to regulation under the Act. The investment advisers and principal underwriters who are plaintiffs herein, perform their services for the mutual funds they serve pursuant to contracts, the terms, execution and continuation of which are subject to the provisions of

Section 15 of the Investment Company Act of 1940, 15 U.S.C. § 80a-15. The securities issued by each of the mutual fund members of the Institute are registered with the Securities and Exchange Commission pursuant to the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* All such securities are offered to the investing public by means of a prospectus which is initially filed with the Securities and Exchange Commission under the Securities Act of 1933 as part of the registration statement for the securities to which the prospectus relates.

As can be readily ascertained, the mutual fund community is composed of three principal members. First the body corporate of the fund itself whose membership is the general investing public. This relationship is analogous to the common productive corporate structure. However, the primary function of the investment corporation is to obtain the objectives which are outlined in their charter through the mutual investment of the funds contributed by the "shareholders." *Aldred Inv. Inst.* v. *S. E. C.*, 151 F.2d 254 (1st Cir. 1945), *cert. denied*, 326 U.S. 795, 66 S.Ct. 486, 90 L.Ed. 483 (1945). The relationship between the shareholder and the body corporate is plainly one of contract. *Stevenot* v. *Norberg*, 210 F.2d 615 (9th Cir. 1954); *see also Schroeter* v. *Bartlett Syndicate Bldg. Corp.*, 8 Cal. 2d 12, 63 P.2d 824, 825; *Ellingwood* v. *Wolf's Head Oil Refining Co.*, 27 Del.Ch. 356, 38 A.2d 743, 154 A.L.R. 406 (1944); Corporations, 18 Am. Jur.2d § 463 (1965).

The management function of the mutual fund lies with the board of directors. They have essentially the equivalent powers as any corporate board of directors. In the same manner they are also responsible to their shareholders as fiduciaries. *Pepper* v. *Litton*, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281 (1939); *Brown* v. *Bullock*, 194 F. Supp. 207 (S.D.N.Y. 1961, *affirmed*, 294 F.2d 415 (2nd Cir. 1961).

The board of directors within its broad scope of authority has the power to enter into contracts with the other

two members of the mutual fund community, that is the investment advisers and the underwriters. The functions performed by the latter two members of the mutual fund community is essential for the propagation of the investment or the mutual fund corporation. The interrelationship of these independent entities is one of contract which essentially determines the respective position occupied within the structure by each member. The independence of each member is governed by statute as is their interdependence; see the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.*

The above few paragraphs outline the general operation of the mutual fund structure. A similar outline is now presented for the operation of the Account as created by the Bank and approved by the Comptroller pursuant to Regulation 9.

The Account as established by the Bank, operates as follows: the investor-customer tenders his funds, $10,000 or more, to the Bank pursuant to a broad authorization making the Bank the customer's managing agent. There is thus created a principal-agent relationship between each individual investor-customer and the Bank. The authorization includes specific authority for the Bank to invest the customer's funds, together with the funds of other customers who have given the equivalent authorization, through the commingled Account. Funds in the commingled Account are invested in a pool of securities, principally common stocks and securities convertible into common stocks, offering the opportunity for long-term growth of capital and income. The Account is divided into "units of participation" of equal value in order to determine conveniently the proportionate interest of each participant. No certificates indicating the "units of participation" are issued by the Bank; however, the participant is informed by a non-negotiable document as to how many "units of participation" are contained in his account.

A participation is transferable only to another person who has validly appointed the Bank as managing agent, and, because of the underlying agency relationship, the interest of a participant terminates upon his death or incompetency and his funds are withdrawn from the Account and held for his legal representatives. There is no sales charge imposed on amounts invested in the commingled Account nor is there any redemption charge incurred upon withdrawal from the Account. An investor-customer may terminate his participation in whole or in part on the basis of the net asset value of the units of participation being redeemed. The net asset value of each unit of participation is determined as of the close of business of each of a number of specified valuation dates by dividing the net asset value of the Account as of the close of business on the valuation date by the number of units of participation then outstanding.

The operation of the Account is supervised by a Committee of five persons, who act essentially as a board of directors of the Account. Initially the members were appointed by the Bank, but hereafter are to be elected annually by the participants. Each participant will be entitled to vote at the election of the Committee members and his vote will be weighted according to the number of "units of participation" in his account. At least 40% of the members of the Committee must at all times be persons not affiliated with the Bank, but the majority of the members may be, and are expected to be, officers in the Bank's Trust and Investment Division.

The Committee is authorized to enter into a management agreement with the Bank. The agreement and any amendments thereto must be approved by more than 50% of the participants at their annual meeting and the Comptroller's approval thereof must also be obtained.

In accordance with the management agreement, the Bank serves as investment adviser and custodian for the Ac-

count. The Bank, therefore, maintains a continuous investment program consistent with the commingled Account's stated investment policy; it will determine what securities are to be purchased and sold, and will execute all transactions. The management agreement provides that the Bank will furnish all administrative, custodial and clerical services required by the Account and will pay all the organization costs and expenses. Subsequent mainteance fees, the cost of independent professional services, such as legal, auditing and accounting services, and the cost of preparation and distribution of notices to participants and proxy statements are to be borne by the commingled Account. The Bank will, however, reimburse the Account for the compensation and expenses, if any, paid by the Account to the members of the Committee who are not affiliated with the Bank; the other members of the Committee will receive no separate compensation for their services to the Account. For these services the Bank receives a fee equal to ⅛th of 1 percent of the average of the net asset value of the Account taken on each valuation date during each fiscal quarter, which is approximately ½ of 1 percent on an annual basis.

Essentially, the commingled management agency Account as delineated by the Bank's plan consists of two principal members, the first being the membership of the Account consisting of the investor-customer, and the second being the Bank which occupies a dual position, one as investment adviser to the Account and the other as general agent to the participants of the Account. The Bank can also be considered to occupy the position of underwriter for the units of participation which are issued to the investor-customer. The Committee of the Account occupies a position equivalent to that occupied by the board of directors of the mutual funds.

The Account has been approved by the Comptroller, even though it does not essentially comply with all provisions of Regulation 9 as promulgated by him. This action indi-

cates that even though the Account as presently structured does not meet every minute detail of the Regulation, any future plans similar to the one established by the Bank will obtain his approval under 12 C.F.R. § 9.18(c)(5). Therefore, it is not necessary for this court to analyze the differences between the Account as established by the Bank and Regulation 9. For the disposition of the issues before this court, the Account will be treated as if it completely meets the substantive requirements of Regulation 9. 12 C.F.R. § 9.

Before the merits of the issues in this case can be reached two preliminary procedural matters must be noted. The Comptroller interposes the objection that the plaintiffs lack standing to sue, and that there is no justiciable issue before this court.

These issues—standing and justiciability—are nominally termed procedural only to differentiate between the initial hurdles which a plaintiff must overcome in order to obtain a judicial determination of his action on the merits, and the actual adjudication of the case on its substantive issues. This characterization often borders on mere semantics, since in order to obtain the proper perspective and focus upon the essence of these issues, as here, the substantive law upon which the plaintiffs premise their action must also be taken into account.

Standing has been, and remains, one of the most enigmatic areas of the law. 3 Davis, Administrative Law Treatise, § 22.18, at 291-92, n. 3. The courts have not developed a single formula which can be applied to a set of facts to determine whether a plaintiff has or does not have standing. The ever changing concepts which have been used in this area of the law can be readily ascertained by the many cases which have been cited in the briefs of both parties upholding their contentions. Due to the pervasiveness of definition in this area, the court is left with no alternative but to examine the long list of cases which

hold that a particular plaintiff has standing on one hand, and on the other the long list of cases where the plaintiff has been denied his day in court because of the lack of standing.

Standing has been generally expressed by an indication that the alleged aggrieved party has asserted a legal right which was his to assert, or has been injured, or has been threatened with injury. Perkins v. Lukens Steel Co., 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940), cf. FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 60 S.Ct. 693, 84 L.Ed. 869 (1940), Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). But standing should not be confused with the doctrine of standing to sue which provides that in an action in a federal constitutional court, by a citizen against a government officer in his official capacity, there is no justiciable controversy unless the citizen shows that such conduct invaded or will invade a private substantive legally protected interest. Associated Industries of New York v. Ickes, 134 F.2d 694, 702 (2nd Cir. 1943) vacated as moot, 320 U.S. 707, 64 S.Ct. 74, 88 L.Ed. 414 (1943), but see Scott v. Macy, 121 U.S.App. D.C. 205, 349 F.2d 182 (D.C. Cir. 1965). The former standing is basically a means by which courts can accept or refuse jurisdiction, and it generally alludes to the capacity of a party to obtain judicial review of an administrative action. See United States v. Storer Broadcasting Co., 351 U.S. 192, 197, 76 S.Ct. 763, 100 L.Ed. 1081 (1956) and Jaffe, Primary Jurisdiction, 77 Harv.L.Rev. 1037 (1964). The doctrine of standing to sue is generally directed towards the capacity of a plaintiff to present his case before a district court *ab initio*.

The question as to whether a plaintiff may obtain judicial relief in cases like this has been variously phrased, but the many appellations which have been devised do not detract from the underlying policy objective which permeates each of these cases. This policy is well enshrined

in Article III, § 2 of the United States Constitution, that is, a "constitutional" federal court cannot be given power to sit in judgment and revise administrative action, since there is no justiciable controversy and the opinion thus issued would merely be advisory. See concurring opinion of Mr. Justice Frankfurter in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 149, 150, 71 S.Ct. 624, 95 L.Ed. 817 (1951), Muskrat v. United States, 219 U.S. 346, 354, 31 S.Ct. 250, 55 L.Ed. 246 (1911), Chicago & Southern Airlines, Inc. v. Waterman Corp., 333 U.S. 103, 113, 68 S.Ct. 431, 92 L.Ed. 568 (1948), United Public Workers of America v. Mitchell, 330 U.S. 75, 89, 67 S.Ct. 556, 91 L.Ed. 754 (1947), Associated Ind. of New York v. Ickes, supra.

Standing to challenge an administrative action can be premised on a statutory provision specifically appended to the statute under which the administrative action was promulgated or where the provision for review has been made generally applicable by the Administrative Procedure Act, 5 U.S.C. §§ 701-704 (recodified by Pub. Law 89-554, 80 Stat. 378). Since there is no specific provision for review of the Comptroller's regulation within the terms of the enabling statute, Title 12, Section 1 et seq., the terms of the Administrative Procedure Act will apply. Citizens Nat. Bank of Maplewood v. Saxon, 249 F.Supp. 557 (D.C. Mo. 1965), affirmed Webster Groves Trust Co. v. Saxon, 370 F.2d 381 (8th Cir. 1966). See also United Gas Pipe Line Co. v. F. P. C., 86 U.S. App. 314, 181 F.2d 796 (1950), cert. denied 340 U.S. 827, 71 S.Ct. 63, 95 L.Ed. 609 (1950).

The pertinent section of the Administrative Procedure Act specifically provides that:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

Under this statutory provision a plaintiff must allege that he has suffered a legal wrong or that a legally protected right will be adversely affected or aggrieved by the agency's action in order to obtain standing before this court. The plaintiffs here are alleging that they are suffering a legal wrong by the allegedly illegal competition made possible by the Comptroller's regulation, thereby being adversely affected or aggrieved. The exact amount of damages which will be incurred by the plaintiffs is rather difficult to assess in precise figures, but the Comptroller has predicted that over the next five to ten years, commercial banks might capture as much as two billion dollars of mutual fund business.[3] The defendant interposes that the competition, even if illegally promulgated, does not create any legal wrong for which the plaintiffs may complain.

In support of its contention that the plaintiffs are not suffering any legal wrong and thereby lack standing to challenge the Comptroller's regulation, the defendant relies on a series of cases which contain the general principle that mere competitive injury made possible by governmental action does not confer standing on the injured party to restrain governmental action. Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 137, 59 S.Ct. 366, 83 L.Ed. 543 (1938); Alabama Power Co. v. Ickes, 302 U.S. 464, 479, 58 S.Ct. 300, 82 L.Ed. 374 (1937); Perkins v. Lukens Steel Co., 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940); Texas State AFL-CIO v. Kennedy, 117 U.S. App. D.C. 343, 330 F.2d 217, 218 (1964); Benson v. Schofield, 98 U.S. App. D.C. 424, 236 F.2d 719 (1956), cert. denied 352 U.S. 976, 77 S.Ct. 363, 1 L.Ed. 2d 324 (year); Kansas City Power & Light Co. v. McKay, 96 U.S. App. D.C. 273, 225

[3] Hearings on H.R. 8499, 9410 before the Commerce and Finance Subcommittee of the House Committee on Interstate and Foreign Commerce, 88 Cong.2d Sess. p. 26 (1964). See also Comment, Of Banks and Mutual Funds: The Collective Investment Trust, 20 Sw.L.J. 334 (1966).

F.2d 924 (1955), cert. denied 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed. 780 (1955). In these cases, the plaintiffs alleged that they were suffering economic loss from the government created competition, but it is significant to note that the competition created by government action in these cases was specifically authorized and sanctioned by Congress and was based upon specific statutory grounds.

Moreover, most of the cases cited by the defendant in support of his allegation that the plaintiffs lack standing have been assiduously distinguished by subsequent decisions of the Supreme Court, even though they have not been expressly overruled. In City of Chicago v. Atchison, Topeka & Santa Fe Railway, 357 U.S. 77, 78 S.Ct. 1063, 2 L.Ed. 2d 1174 (1958), the Supreme Court gave explicit recognition to a competitor's standing to challenge illegal competition. That case involved two competitors, one of whom (Parmelee) had alleged that the other (Transfer) was operating illegally because it had not complied with certain licensing requirements imposed by the City of Chicago. Transfer argued that Parmelee had no standing to object to Transfer's allegedly illegal competition, but this argument was flatly rejected by the Court:

> "It is enough, for purposes of standing, that we have an actual controversy before us in which Parmelee has a direct and substantial personal interest in the outcome. Undoubtedly it is affected adversely by Transfer's operation, Parmelee contends that this operation is prohibited by a valid city ordinance and asserts the right to be free from unlawful competition.
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> * * * * * *
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> "[Transfer] argues that a party has no right to complain about lawful competition, citing Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374, and Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543. We do not regard either of these cases as controlling here. It seems to us that Transfer's argument

confuses the merits of the controversy with the standing of Parmelee to litigate them. * * * Parmelee's standing could hardly depend on whether or not it is eventually held that Transfer can lawfully operate without a certificate of convenience and necessity." 357 U.S. 77, at 83-84, 78 S.Ct. 1063, at 1067.

With regard to some later cases holding that competitors had standing, see American Trucking Ass'ns, Inc. v. United States, 364 U.S. 1, 80 S.Ct. 1570, 4 L.Ed. 2d 1527 (1960), National Motor Freight Traffic Ass'n v. United States, 371 U.S. 223, 83 S.Ct. 311, 9 L.Ed. 2d 273, rehearing denied 372 U.S. 246, 83 S.Ct. 688, 9 L.Ed. 2d 709 (1963), affirming 205 F.Supp. 592 (D.C. D.C. 1962) only on the merits but not as to the standing issue; Philco Corp. v. FCC, 103 (U.S. App. D.C. 278, 257 F.2d 656 (1958), cert. denied 358 U.S. 946, 79 S.Ct. 350, 3 L.Ed. 2d 352 (1959); Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co., 116 U.S. App. D.C. 285, 323 F.2d 290 (1963), rev'd on other grounds, 379 U.S. 411, 85 S.Ct. 551, 13 L.Ed. 2d 386 (1965).

In two recent cases challenging the authority of the Comptroller to promulgate regulations under other sections of the banking statutes, the plaintiffs have been granted standing to challenge the regulations over the objections of the Comptroller. Since these cases are directly in point they will be discussed at length. In Baker, Watts & Co. v. Saxon, 261 F.Supp. 247 (D.C. D.C. 1966), a number of plaintiffs, engaged in underwriting and distributing revenue bonds, sought a declaratory judgment that the Comptroller's regulations authorizing commercial banks, for the first time, to enter the revenue bond business violated the Glass-Steagall Act. The Comptroller raised the standing defense, citing the identical cases as brought forth in his present argument. Judge Holtzoff summarily disposed of that contention by stating:

"The gravamen of the plaintiffs' claim for relief is that they are being subjected to competition by illegal

activities of national banks. While no one may maintain a suit to restrain lawful competition merely because he is suffering an economic detriment, nevertheless, a person has a standing to complain against illegal competition, or specifically, against competition on the part of a person who lacks the legal right or power to pursue the competitive activities." 261 F.Supp. at 248.

Judge Holtzoff's opinion focuses not on the impairment of the plaintiffs' competitive position by the unlawfully created competition, but rather on the premise that but for the illegal competition condoned by the Comptroller's regulation, the plaintiffs would not have any economic detriment to base their complaint.

Likewise, in Georgia Association of Independent Insurance Agents, Inc. v. Saxon, 260 F.Supp. 802 (N.D. Ga. 1966), the district court denied a motion to dismiss for lack of standing. In that case the Comptroller had authorized, for the first time, national banks to sell insurance in towns with more than 5000 people, even though Section 92 of Title 12 of the United States Code permitted banks to act as insurance agents only in places with a population of 5000 or less. Plaintiffs were insurance agents and trade organizations representing insurance agents. Plaintiffs there alleged that the Comptroller was acting beyond his authority to issue the ruling which was in direct violation of 12 U.S.C. § 92 and that, as a result, national banks were able to illegally compete with the plaintiffs. The district court, in reaching its conclusion, observed that:

"In Tennessee Electric Power Co., supra, and in Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374 (1937), the plaintiffs alleged that they were suffering economic loss from the government-created competition. In both cases the Supreme Court held that such economic loss alone did not confer standing on the aspiring plaintiffs. It is important

to note that such competition was authorized by Congress and was based upon statutory grounds.

"In the instant case, the competition complained of is not explicitly authorized by statute, but rather is impliedly prohibited by the congressional grant of the power * * *." 260 F.Supp. at 803.

The district judge, in denying the Comptroller's motion to dismiss, further stated:

"The Court is of the opinion that the defendant's attack on the plaintiffs' standing is without merit. Title 12 U.S.C.A. § 92 has the effect of protecting insurance agents from certain competition. Surely, the plaintiffs have the right to their day in court to show that the protection afforded them by 12 U.S.C.A. § 92 has been violated." 260 F.Supp. at 804.

Subsequent to its finding of standing, the District Court ruled on the merits of the issues and granted the declaratory judgment and injunction which was sought by the plaintiffs. 268 F.Supp. 236 (N.D. Ga. 1967).

Defendant places great reliance in his brief on the recent case of Pennsylvania Railroad Co. v. Dillon, 118 U.S. App. D.C. 257, 335 F.2d 292 (1964), cert. denied sub nom. American Hawaiian Steamship Co. v. Dillon, 379 U.S. 945, 85 S.Ct. 437, 13 L.Ed. 2d 543 (1964).

In that case plaintiffs alleged not only that defendant Dillon had exceeded his statutory authority but also that the competitive activity which had been allowed was in and of itself illegal. The competing carriers challenged the authority of the Secretary of the Treasury to enroll certain vessels in the coastwise trade, allegedly in violation of the Merchant Marine Act of 1920, as amended, 46 U.S.C. § 883. That section prohibited the enrollment and documentation of vessels "jumboized" by installation of foreign-made mid-bodies. The Court of Appeals for the District of

Columbia Circuit found that the carriers lacked standing even though they alleged the competition was illegal and in violation of the specific provision of the statute. The Court pointed out the dichotomy of Section 10(a) of the A.P.A., namely the "legal wrong" aspect and the "adversely affected or aggrieved" aspect, as it related to the issue of standing and it concluded that:

> "Under either leg of Section 10(a), therefore, since appellants only complain of government enhancement of economic competition, they must demonstrate 'statutory aid to standing'." 335 F.2d at 295.

After analyzing the enabling statute the Court concluded that "Congress did not intend to insulate coastwise carriers from other domestic competition or to give them any legally protected right to be free of such competition." 335 F.2d at 295.

A close analysis of the holding in the *Pennsylvania Railroad*, supra, case does not require a determination of the standing issue adverse to the plaintiffs. In that case the Court of Appeals found that the underlying purpose of the statute under which the regulation was promulgated was to stimulate and encourage resort to domestic shipyards and thus to ensure them sufficient business so that their facilities would be adequate at times of national emergencies. 335 F.2d 292, at 295. The statutes, under which the regulation in issue was promulgated, were enacted to establish a clear Congressional policy which sought to separate national commercial banking from the securities business.[4] The primary intent of Congress was to

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[4] Hearings Pursuant to S.Res. 71 Before a Subcommittee of the Senate Committee on Banking and Currency, 71st Cong. 3rd Sess. (1931).

S.Rep. No. 77, 73d Cong. 1st Sess. (1933). H.R.Rep. No. 742, 74th Cong. 1st Sess. (1935).

See also 75 Cong.Rec. 9909 (1932) (remarks of Senator Bulkley).

segregate these functions and to allow separate entities to engage in these business areas. This clarity of purpose is garnered not only from the Congressional hearings reports of the Glass-Steagall Act, but also from the exactitude with which Congress has delineated the areas of common interest in this financial structure.[5] This strong general policy against the invasion of either field of endeavor by either entity is sufficient to postulate an interest upon which standing to challenge the regulation may be premised, cf. American Trucking Ass'ns, Inc. v. United States, 364 U.S. 1, 80 S.Ct. 1570, 4 L.Ed.2d 1527 (1960).

Therefore, by implication, the plaintiffs here have a right to complain of the competition which is being condoned under the Regulation. This competition is illegal in the sense that Congress has indicated its policy of separating the two financial institutions and this Regulation allows in an indirect manner a joinder of these interests. The plaintiffs were the recipients by implication of Congressional protection.

Even if this invasion would not in fact cause a palpable injury[6] to be inflicted upon the plaintiffs which could be termed to be a legal wrong under the first leg of Section 10(a) of the A.P.A., now 5 U.S.C. § 702, the plaintiffs could have standing to represent the public interest as held in Sanders Bros. Radio Station v. F.C.C., 309 U.S. 470, 60 S.Ct. 693, 84 L.Ed. 869 (1940). Scripps-Howard Radio, Inc. v. F.P.C., 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229 (1942), and F.C.C. v. N.B.C. (K.O.A.), 319 U.S. 239, 63 S.Ct. 1035, 87 L.Ed. 1374 (1943). See the application of this doctrine by Judge Frank in Associated Industries of New York v.

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[5] Note specifically amendments made to Section 24, par. Seventh of Title 12.

[6] Bantam Book v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963)—see also the discussion of the "Adversely Affected in Fact" doctrine promulgated by Prof. Davis, 3 Davis, Administrative Law Treatise § 22.02 (1965 Supp.).

Ickes, 134 F.2d 694 (2nd Cir. 1943), vacated as moot 320 U.S. 707, 64 S.Ct. 74 (1943).

The practical effect of the doctrine advanced by those series of cases grants standing to challenge the legality of administrative action to one who is in fact adversely affected by administrative action. Standing in those instances is predicated upon the theory that the plaintiffs do not represent their own private property interests but rather the interests of the public. In the instant situation the plaintiffs could be classified as private "Attorneys General" based on the premise that the public policy dictated by Congress in the Glass-Steagall Act is not being adhered to by the agency charged with its enforcement. See Philco Corp. v. F.C.C., 103 U.S.App.D.C. 278, 257 F.2d 656 (1958), cert. denied 358 U.S. 946, 79 S.Ct. 350, 3 L.Ed.2d 352 (1959), where the competitive interest of a manufacturer and not a broadcaster was held sufficient to satisfy the "person aggrieved" provision of the Federal Communications Act. See also Jaffe, Standing to Secure Judicial Review: Public Actions and Private Actions, 74 Harv. L.Rev. 1265 (1961), 75 Harv.L.Rev. 255 (1961), and Davis, 3 Administrative Law Treatise §§ 22.04, 22.05, 22.11 (1958), (Supp.1965).

Finally, a denial of standing, as urged by the defendant, would leave the plaintiffs and all others similarly situated without a right to seek redress against capricious, arbitrary and unwarranted Regulations issued by the Comptroller, however flagrant and contrary to the intent of Congress. This court, therefore, holds that the plaintiffs have standing to challenge the Comptroller's Regulation 9.

The Comptroller also asserts that there is no justiciable issue or controversy present in this case. This assertion is bifurcated on two grounds. The first is apparently premised upon the theory that the Comptroller's regulation permitting national commercial banks to establish the commingled Account does not regulate nor does it impose any obliga-

tion or duty upon the plaintiffs. The standards of justiciability are not limited to those situations in which the plaintiffs are directly regulated by the defendant government official. Indeed, in none of the branch bank cases in which the plaintiff was a state bank did the challenged regulations impose a duty upon or regulate the plaintiffs in any manner. E.g. First Hardin National Bank v. Fort Knox National Bank, 361 F.2d 276 (6th Cir. 1966); First National Bank of Smithfield, N. C. v. Saxon, 352 F.2d 267 (4th Cir. 1965); Union Savings Bank of Patchogue v. Saxon, 118 U.S.App.D.C. 296, 335 F.2d 718 (1964); Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co., 116 U.S.App.D.C. 285, 323 F.2d 290 (1963), rev'd on other grounds 379 U.S. 411, 85 S.Ct. 551, 13 L.Ed. 2d 386 (1965), Commercial Security Bank v. Saxon, 236 F. Supp. 457 (D.C.D.C. 1964), affirmed First National Bank of Logan, Utah v. Walker Bank and Trust Co., 385 U.S. 252, 87 S.Ct. 492, 17 L.Ed.2d 343, (1966) rehearing denied 385 U.S. 1032, 87 S.Ct. 738, 17 L.Ed.2d 680 (1967). However, the justiciability assertion made by the Comptroller in each of these cases was decided adversely to the Comptroller.

The district court in Baker, Watts & Co. v. Saxon, supra, summarily rejected the Comptroller's contention, stating that:

> "* * * a justiciable controversy obviously exists justifying the Court in entertaining an action for a declaratory judgment. The plaintiffs claim that the defendant is authorizing national banks to conduct certain activities in violation of the law and that these activities transgress the powers of the banks and that they are injurious to the plaintiffs." 261 F.Supp. at 249.

The second ground for the lack of justiciability is premised on the theory that only the Comptroller can challenge the acts of a national commercial bank when it acts in excess of its powers. However, the primary thrust of

the plaintiffs' allegation is directed not at the national bank which is acting under authority granted by the Comptroller, but rather at the scope of the authority under which the Comptroller promulgated the regulation in issue. The district court in Georgia Association of Independent Insurance Agents, Inc. v. Saxon, supra, simultaneous with its denial of the motion to dismiss for lack of standing, rejected the Comptroller's assertions on the issue of justiciability. It unequivocally stated that:

> "The defendant further contends that * * * the Comptroller is sole enforcer of the National Banking Act. This contention is impliedly repudiated by the repeated decisions that banks have standing to challenge an allegedly illegal order * * * and was explicitly repudiated in an opinion by the Fifth Circuit Court of Appeals which stated. 'The fact that the Comptroller is charged under 12 U.S.C. § 93 with the duty of enforcing the National Banking Act certainly does not have the effect of prohibiting actions to enforce that law by any other party who might have a legitimate interest. Jackson v. First National Bank of Valdosta, 349 F.2d 71, at p. 75 (1965).'" 260 F. Supp. at 804.

A recent Supreme Court decision inferentially rejects the Comptroller's arguments on the lack of justiciability, Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). The Supreme Court reversed and remanded to the Court of Appeals for the Third Circuit so that the Court of Appeals could consider the issues on the merits. The Court of Appeals had reversed the district court's decision without reaching the merits of the case, Abbott Laboratories v. Celebrezze, 352 F.2d 286 (3rd Cir. 1965). The district court had found that "a justiciable controversy arises where plaintiff is confronted with substantial present or imminent harm. * * * the very presence of a threat of harm makes the regulations ready

for review." 228 F.Supp. 855, 861 (D.C.Del. 1964). The Court of Appeals reversed on the basis that no "actual case or controversy" existed as required for justiciability under the Declaratory Judgments Act. However, the Supreme Court decreed that "the impact of the regulations upon the plaintiffs is sufficiently direct and immediate so as to render the issue appropriate for judicial review at this stage." 387 U.S. at 152, 87 S.Ct. at 1517.

Having found that the plaintiffs have standing to seek redress and that they have presented a justiciable issue, we are now ready to seek a resolution of the subject matter involved in this litigation.

The principal issue involved in this controversy is whether or not the Comptroller has the statutory authority to empower national commercial banks to create, organize and manage the commingled Account. The gist of the activity of managing the Account consists of the purchase and sale of equity securities, nominally for long-term growth of capital and income, for the participating members. National banks have only such powers as are expressly given by federal statute or by necessary implication therefrom, 12 U.S.C. § 24. Houston v. Drake, 97 F.2d 863 (9th Cir. 1938), Baltimore & O. R. Co., et al. v. Smith, 56 F.2d 799 (3rd Cir. 1932), and in some trust activities they may be authorized to act by the Comptroller in any capacity in which competing state banks are permitted to act. 12 U.S.C. § 92a(a). See First National Bank in St. Louis v. State of Missouri, 263 U.S. 640, 44 S.Ct. 213, 68 L.Ed. 486 (1923), and Mercantile National Bank at Dallas v. Langdeau, 371 U.S. 55, 83 S.Ct. 520, 9 L.Ed2d 523 (1962), City of Yonkers v. Downey, 309 U.S. 590, 60 S.Ct. 796, 84 L.Ed. 964 (1940), rehearing denied 310 U.S. 656, 60 S.Ct. 1071, 84 L.Ed. 1420, and Condon v. Downey, 310 U.S. 656, 60 S.Ct. 1071, 84 L.Ed. 1420, United States v. Palmer, 28 F.Supp. 936 (D.C.N.Y. 1939).

Authority to oversee trust activities of national banks which was vested in the Federal Reserve Board of Gov-

ernors, 12 U.S.C. § 248(k) was repealed in 1962 when authority to regulate the fiduciary activities of national banks was transferred to the Comptroller. 12 U.S.C. § 92a, 76 Stat. 668, Pub.L. 87-722. Upon transfer of this authority the Comptroller issued Regulation 9 pursuant to which the First National City Bank established the commingled Account. In order to determine the validity of Regulation 9, it will be necessary to investigate each section of the relevant statutes and also to determine the intent of Congress when it enacted the relevant statutes. In order to complete the determination of the issues involved, it will also be necessary to determine whether or not the relevant state statute, here the N. Y. Banking Law, McKinney's Consol. Laws, c. 2, Section 100, allows local state banks to act in a similar fashion as is presently being allowed by Regulation 9.

This Regulation authorizes national banks to commingle managing agent accounts, allowing, therefore, the bank to purchase equity securities for the Account in general and not for any specific participating member. The essence of this activity is the purchase and sale of securities deriving thereby a benefit for the participating members, and fulfilling the stated purpose of the Account.

The first statutory provision which is encountered along the logical progression to our conclusion is 12 U.S.C. § 92a which delineates the trust powers which the Comptroller is authorized to grant to the national banks. Section 92a (a) provides:

> "The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other cor-

> porations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located."

and under 12 U.S.C. § 92a(j) the Comptroller:[7]

> "* * * is authorized and empowered to promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein." 76 Stat. 668, Pub.L. 87-722 § 1.

Pursuant to this statutory authority the Comptroller can empower national banks the right to act in a fiduciary capacity and to issue regulations controlling this activity. From the statutory language it can be concluded that the Comptroller can grant trust powers to the national banks; but the real crux of this issue is whether or not the commingled Account can be considered a fiduciary activity as provided by the statute.

The Comptroller cotends that there can be no doubt that the Bank's relationship to the participants in the commingled Account is a fiduciary relationship; however, this general statement, upon close analysis, is untenable. The principal-agent relationship arises from a contractual agreement between the parties. The nature of this relationship gives rise to certain duties which are implied by the law, namely, a fiduciary duty and a duty of loyalty. The trustee and the agent have an equivalent duty of loyalty. The fiduciary duty of the agent is similar to but not the equivalent of the fiduciary duty of a trustee.

The many differences as to the characteristics of a principal-agent relationship and a trustee relationship are notable especially as they relate to the issue in this case.

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[7] Section 11(k) of the Federal Reserve Act, as amended, 12 U.S.C. § 248(k) (repealed), empowered, in identical terms the Federal Reserve Board to issue regulations.

Consent of both principal and agent is a necessary requirement for the creation of the relation whereas the beneficiary of a trust need not consent. An agent is subject to the control of his principal, but a trustee is not subject to the control of the beneficiary. An agent can bind his principal by contract or otherwise, but a trustee has no such power with regard to his beneficiary. The agency relationship is terminable by the direction of the principal or by his death without any express provision to that effect, but this is untrue with respect to a trust unless the instrument so provides. See Restatement (Second) of Agency, Section 13, comment a, Section 14B, comments e to h, and Section 425, comment a. Note also Bogert, Trusts and Trustees, § 15 (2d. ed. 1965) p. 70 and Restatement of Trusts, 2d § 8, comment i.

The Bank and the individual participant of the Account enter into an agency relationship prior to or simultaneous with the participant's engagement with the Account. The Bank's role in this relationship is one of managing agent, not as trustee for the participant. A leading authority on the law of trusts has stated:

> "The duties and powers of the institution [e.g. a bank] as agent are determined by the terms of the contract made with the customer; the duties and powers of the institution as trustee depend not only upon the terms of the trust but also upon the principles and rules of the common law and of statutes which are applicable to the trust relation. The liabilities of the institution as agent depend upon whether it has failed to use due care in the performance of the duties which it undertakes; its liabilities as a trustee depend upon whether it has committed a breach of trust. Ordinarily the responsibilities of the institution are more extensive where it acts as trustee than where it acts as agent, and it may incur no liabilities as agent for conduct which would render it liable if it were trustee." 1 Scott on Trusts, Section 8.1 Bank as Trustee or Agent (2d. ed. 1956).

The courts, as well as the recognized authorities in trust law, have distinguished sharply between the responsibilities of a true trustee and those of a managing agent, even where the latter is granted complete discretion in acting for his principal. It is, of course, established that the managing agent occupies a position of confidence, in which he must act with reasonable care and is held to a standard of conduct higher than that which prevails in the ordinary course of business in the marketplace. But the courts have stated plainly that this is not the high standard of care and strict accounting imposed upon a trustee, Stephens v. Detroit Trust Co., 284 Mich. 149, 278 N.W. 799 (1933); Anderson v. Abbott, 61 F. Supp. 888 (W.D.Ky. 1945); O'Connor v. Burns, Potter & Co., 151 Neb. 9, 36 N.W. 2d 507 (1949). In both the *Stephens* and *O'Connor* cases the principal brought suit for accounting against the defendant managing agent on the basis that they had breached the high duty of care imposed upon a trustee. The decisive factor in both cases was that the relationship which existed between the parties had been freely chosen and established and, having entered into an agency contract, the investor could not assert that the relationship was in fact a trust.[8]

Contrary to the contentions made by the Comptroller, the managing agent relationship is not a true fiduciary relationship as it has been defined by the courts and by the recognized authorities in this field. Therefore, it is concluded that the managing agency relationship does not fall within the traditional fiduciary powers as delineated in 12 U.S.C. § 92a(a).

Section 12 U.S.C. 92a(a), however, permits a national bank to act "in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national

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[8] But see, Saxon and Miller, Common Trust Funds, 53 Geo.L.J. 994, 1015, and Main, Common Trust Funds, 83 Banking L.J. 565.

bank is located." This saving provision allows national banks to offer the equivalent fiduciary services to their customers that a local state bank might offer.

The Comptroller has authorized the First National City Bank, located in New York state, to establish a commingled Account pursuant to Regulation 9, and under the competitive provision of 12 U.S.C. § 92a(a) the authorization granted to First National City Bank may be legally valid, if the banking laws of New York state allow competing institutions to establish a commingled Account.

The general powers of state banks in New York state are contained in McKinney's Consol.Laws, c. 2, N.Y. Banking Law § 96 as amended, L.1966, c. 324. These general powers have been supplemented by specific statutory provisions which grant state banks the power to act in a fiduciary capacity, N.Y. Banking Law, §§ 100, 100-a, 100-b, 100-c, as amended. Each of these statutory provisions delineate the authorization of state banks with a definite degree of specificity, and none of the sections noted above allow a commingling of managing agency accounts. The only section which could even be deemed to inferentially grant this authority is Section 100-c, which relates to the power of banks to commingle funds held in a fiduciary capacity, specifically requiring that common trust funds be limited to moneys received and held "as executor, administrator, guardian, personal or testamentary trustee, donee of a power during minority to manage property vested in an infant or committee * * *."

A search of the New York state case law has failed to reveal any relevant judicial interpretation of this statutory section. However, it has been held that state banks are prohibited to exercise any power which was not expressly granted, O'Connor v. Bankers Trust Co., 159 Misc. 920, 289 N.Y.S. 252 (Sup.Ct. 1936) affirmed 278 N.Y. 649, 16 N.E. 2d 302; see also Nassau Bank

v. Jones, 95 N.Y. 115, 47 Am.Rep. 14, (Ct. of App. 1884). These decisions indicate that New York state courts follow the federal rule, applicable to national banks, as expressed in Calif. Bank v. Kennedy, 167 U.S. 362, 17 S.Ct. 831, 42 L.Ed. 198 (1897), that the exercise of power not expressly granted to a national bank is prohibited. This restrictive interpretation of the powers granted under Section 100-c is further substantiated by noting that when the New York legislature has wanted to broaden the categories of accounts held and administered by banks which could be invested in a common trust fund, it has amended Section 100-c to do so.[9]

It is the conclusion of this court that the commingling of managing agency accounts is not authorized either under the federal statutes or the New York banking laws.

Even if the managing agency accounts could be considered bona fide fiduciary activities, and, therefore, authorized by the present statutes, the commingling of these accounts would still be illegal under the provisions of the Glass-Steagall Act. In order to arrive at this determination it is necessary to make an exact characterization of the Account which was established.

As noted in the early section of this decision, a mutual fund continuously issues its own securities as does the commingled Account. A mutual fund invests the proceeds from the sale of its securities in a diversified investment portfolio, in the same manner as the commingled Account.

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[9] For example, that section was amended to permit a state bank acting as the "donee of a power during minority to manage property vested in an infant" to place the property so managed in a common trust fund, L.1958, c. 496 § 1; L.1965, c. 824 § 5. Note also the specific accounting and notice provisions which are contained in Section 100-c as strictly construed by the courts in In re Lincoln Rochester Trust Co., 201 Misc. 1008, 111 N.Y.S.2d 45 (1952). See also New York Banking Board Regulation, 3 N.Y. C.R.R. 11.91 which states that a common trust fund "may be operated only for true fiduciary purposes."

The mutual fund shares obtains for the investor an undivided interest in the fund's portfolio, as does a unit of participation in the commingled Account. Within certain limitations, a participating member of the Account can redeem his units of participation in a similar manner as the holder of mutual fund shares. A majority of the participating members elect the members of the Committee, who oversee the affairs of the Account in much the same manner as mutual fund stockholders elect their board of directors or trustees. The SEC has required the Account to register as an investment company under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 et seq. The SEC pursuant to its authority under 15 U.S.C. § 80-3(c), has granted certain exemptions to the requirements of the Investment Company Act as it relates to board membership;[10] nevertheless it has recognized the similarity between the Account and an investment company.[11] The Bank and the Committee have entered into a contractual agreement under which the Bank performs managing and advising functions for the Account. This contract is the equivalent of the contracts which are entered into by the mutual funds and their investment advisers. These contracts are subject to and must be submitted for review by the SEC under the provisions of the Investment Company Act.

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[10] The exemptions which were granted are being challenged in the Court of Appeals for the District of Columbia Circuit, National Association of Securities Dealers, Inc. v. Security Exchange Commission, Appeal No. 20,164, decided Nov. 21, 1967.

[11] The similarity between mutual funds and the Account have been noted by many authorities in the financial community, see Hearings on S. 2704 on Collective Investment Funds Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, 89th Cong., 2d Sess. (1966); University of Pennsylvania Law School Conference on Mutual Funds, 115 U.Pa.L.Rev. 669; and Comment, Of Banks and Mutual Funds, 20 Sw.L.J.

There are some differences between a mutual fund and a commingled Account,[12] but these are not substantially sufficient to create a legal differentiation between the two investment vehicles. The similarities between these related activities are a sufficient basis to draw an analogy from which an equivalency can be premised.

The Comptroller attempts to differentiate between the mutual fund investment vehicle and the commingled Account by attempting to establish a major difference between a mutual fund share and a unit of participation. This differentiation is premised on the basis that the unit of participation is not a security as such. This is mere tautology and a matter of semantics.

The United States Supreme Court has noted that for the purposes of the Securities Act of 1933 the test for a security is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. SEC v. W. J. Howey, Co., 328 U.S. 293, 301, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946). See also S.E.C. v. Variable Annuity Life Ins. Co., 359 U.S. 65, 79 S.Ct. 618, 3 L.Ed.2d 640 (1959) and Prudential Insurance Co. of America v. S.E.C., 326 F.2d 383 (3rd Cir. 1964), cert. denied 377 U.S. 953, 84 S.Ct. 1629, 12 L.Ed.2d 497 (1964). Under this all encompassing definition, in its most comprehensive sense, whenever an investor relinquishes control over his funds and submits their control to another for the purpose and hopeful expectation of deriving profits therefrom he is in fact investing his funds in a security. The unit of participation in the commingled Account is in fact a security and has been so recognized by the SEC by its requirement that the Bank register the units of participation under the Securities Act of 1933.

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[12] See Hearings on S. 2704 (1966) supra, at pp. 55 and 56.

The Comptroller argues, however, that the definition of "securities" for the purpose of the Securities Act of 1933 is not applicable to define "securities" as the term is used in the Glass-Steagall Act. He asserts that this definition as judicially and administratively derived has no relevance to the meaning of the various provisions of the national banking laws. He bases this assertion on the allegedly different purposes which the laws have, namely that the securities laws were enacted to protect the interests of investors while the banking laws were enacted to protect the country's credit and currency and the solvency of the national banks. This differentiation fails to focus upon the primary essence of the complete regulatory scheme which the Congress enacted to mitigate the problems that the country faced in the 1930s. Congress, after extensive investigation, realized that the financial community needed stabilization in order to overcome the debacle which arose in 1929 and to prevent any further recurrences. It would be inconsistent to conclude that Congress did not intend to obtain the equivalent meaning for the term "securities" as used in the Securities Act of 1933 when it used the term in the Glass-Steagall Act which was enacted by the same Congress.[13]

By finding that the Account is an equivalent investment vehicle to a mutual fund and that the units of participation are in fact securities, it is, therefore, necessary to determine whether or not the Bank is barred from these activities by the provisions of the Glass-Steagall Act, Sections

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[13] The Federal Reserve Board has repeatedly ruled that participations or shares in mutual funds are securities for purposes of the Glass-Steagall Act, and it has similarly characterized the units of participation in the bank sponsored commingled managing agency account, Federal Reserve Board Legal Memorandum, "Legal Considerations Under Section 32 of the Banking Act of 1933 in Connection With the Proposed Commingled Investment Account of First National City Bank of New York" (Dec. 15, 1965) reprinted in Hearings on S. 2704 (1966) at 581-588.

16, 20, 21 and 32, codified in 12 U.S.C. §§ 24, 377, 378 and 78 respectively.

The first relevant section is 12 U.S.C. § 24 dealing with the explicit powers granted to the national banks by the Congress. For our analysis only paragraph Seventh is pertinent. It states:

> "To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock: *Provided,* That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe. * * *"

The power of national banks to deal in securities has had a motley history, both legislatively and judicially. In 1823 the Supreme Court held that a prohibition against a national bank's trading and dealing in stocks was nothing more than a prohibition against engaging in the ordinary business of buying and selling stocks for a profit and it did not include purchases resulting from ordinary banking transactions. Fleckner v. Bank of the United States, 8 Wheat, 338, 351, 21 U.S. 338, 351, 5 L.Ed. 631 (1823). In First National Bank of Charlotte v. Nat. Exchange Bank,

92 U.S. 122, 23 L.Ed. 679 (1875), the Supreme Court stated that "Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power." 92 U.S. at 128. The Court in the First National Bank case was interpreting, Rev.Stat. § 5136, par. 7, 15; 15 Stat. 101 § 8, the forerunner of 12 U.S.C. § 24, par. 7 which delineated the powers of the national banks.

The limitation on the national bank's power in security dealings was reiterated in subsequent decisions of the Supreme Court. Concord First National Bank v. Hawkins, 174 U.S. 364, 371, 19 S.Ct. 739, 43 L.Ed. 1007 (1898); California Nat. Bank v. Kennedy, 167 U.S. 362, 17 S.Ct. 831, 42 L.Ed. 198 (1897); McCormick v. Market National Bank, 165 U.S. 538, 17 S.Ct. 433, 41 L.Ed. 817 (1896); see also Birdsell Mfg. Co. v. Anderson, 20 F.Supp. 571 (W.D. Ky. 1937) affirmed 104 F.2d 340 (6th Cir. 1939), and Michelsen v. Penney, 135 F.2d 409, 424 (2nd Cir. 1943).

This implied limitation caused the national banks to establish security affiliates, organized under state law, to profit from underwriting and dealing in stocks and other securities. In 1927 Congress passed the McFadden Act which added to the list of banking powers in paragraph Seventh of Section 5136 of the Revised Statutes the following proviso:

> "Provided, that the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations evidencing indebtedness of any person, copartnership, association, or corporation, in the form of bonds, notes and/or debentures, commonly known as investment securities, under such further definition of the term 'investment securities' as may by regulation be prescribed by the Comptroller of the Currency * * *. [Act of February 25, 1927 (McFadden Act), Section 2(b), 44 Stat. 1226]"

This proviso was intended to be a confirmation and a regulation of the investment security business which was being conducted by the banks through their security affiliates. H.R.Rep.No. 83, 69th Cong. 1st Sess. (1926). By the provisions of this Act, the national banks were authorized by statute to engage in the business of underwriting and dealing in investment securities.

The storms looming on the horizon were not within the contemplation of very many people in 1927. It was not until 1931 when the Congress, graced with hindsight, sought the primary causes of the debacle which enveloped the country and had its repercussions throughout the world. The Congressional inquiry generated various statutes in an attempt to avoid a repetition of the debacle which had transpired. Among these statutes were the Glass-Steagall Act and the Securities Act of 1933.

The Glass-Steagall Act in particular redefined the powers of the national banks and imposed severe limitations on their activity in the investment security business by amending 12 U.S.C. § 24, par. 7, and adding 12 U.S.C. §§ 78, 377 and 378. Section 24, paragraph Seventh, has been noted above. The other relevant sections are noted below. Section 32 of the Glass-Steagall Act, now 12 U.S.C. § 78, provides:

> "No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly

influence the investment policies of such member bank or the advice it gives its customers regarding investments."

Section 20 of the Glass-Steagall Act, now 12 U.S.C. § 377, provides:

"After one year from June 16, 1933, no member bank shall be affiliated in any manner described in subsection (b) of section 221a of this title with any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities: *Provided,* That nothing in this paragraph shall apply to any such organization which shall have been placed in formal liquidation and which shall transact no business except such as may be incidental to the liquidation of its affairs.

"For every violation of this section the member bank involved shall be subject to a penalty not exceeding $1,000 per day for each day during which such violation continues. Such penalty may be assessed by the Board of Governors of the Federal Reserve System, in its discretion, and, when so assessed, may be collected by the Federal reserve bank by suit or otherwise.

"If any such violation shall continue for six calendar months after the member bank shall have been warned by the Board of Governors of the Federal Reserve System to discontinue the same, (a) in the case of a national bank, all the rights, privileges, and franchises granted to it under chapter 2 of this title may be forfeited in the manner prescribed in sections 141, 222-225, 281-286 and 502 of this title, or, (b) in the case of a State member bank, all of its rights

and privileges of membership in the Federal Reserve System may be forfeited in the manner prescribed in sections 321-332 of this title."

Section 21 of the Glass-Steagall Act, now 12 U.S.C. § 378, provides:

"(a) After the expiration of one year after June 16, 1933, it shall be unlawful—

"(1) For any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor: *Provided,* That the provisions of this paragraph shall not prohibit national banks or State banks or trust companies (whether or not members of the Federal Reserve System) or other financial institutions or private bankers from dealing in, underwriting, purchasing, and selling investment securities to the extent permitted to national banking associations by the provisions of section 24 of this title: *Provided further,* That nothing in this paragraph shall be construed as affecting in any way such right as any bank, banking association, savings bank, trust company, or other banking institution, may otherwise possess to sell, without recourse or agreement to repurchase, obligations evidencing loans on real estate;

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"(b) Whoever shall willfully violate any of the provisions of this section shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both, and any officer, director,

employee, or agent of any person, firm, corporation, association, business trust, or other similar organization who knowingly participates in any such violation shall be punished by a like fine or imprisonment or both."

The obvious purpose of these legislative enactments was to divorce the banking business from the security investing business. Congress was so emphatic in promulgating this divorce, that it included a criminal provision to assure the efficacy and continuity of the separation; see 12 U.S.C. § 378(b), supra, and in some instances it imposed money penalties and forfeitures; see 12 U.S.C. § 377, supra. The many pages of legislative hearings reports which preceded the final enactment of the Glass-Steagall Act contain and outline the potential dangers which the involvement of commercial banking in the investment security business created.

These potential dangers were noted by the Comptroller of the Currency in his report of 1920, excerpts of which were cited by the Subcommittee of the Senate conducting the investigation:

"Some 'securities companies' operating in close connection with, and often officered by, the same men who manage the national banks with which they are allied, have become instruments of speculation and headquarters for promotions of all kinds of financial schemes. Many of the flotations promoted by the 'securities corporations' which are operated as adjuncts to national banks have proven disastrous to their subscribers, and have in some instances reflected seriously not only upon the credit and the standing of the 'securities companies' by which they are sponsored, but also in some cases have damaged the credit and reputation of national banks with which the 'securities companies' are allied.

"It has been established clearly by decisions of the United States Supreme Court that a national bank can not, except as authorized by the Federal reserve act, hold the stock of other national banks or the stock of other corporations; but these adjunct or auxiliary companies whose stockholders are identical with the stockholders of the national banks with which they are connected by various ties and devices frequently deal actively in stocks, and they also sometimes acquire the ownership or control of other banks, National and State, through their stock purchases.

"In times of rising prices and active speculation some of these auxiliary corporations have made large profits through their ventures and syndicate operations, but their losses in other periods have been heavy, and they have become an element of increasing peril to the banks with which they are associated. The business of legitimate banking is entirely separate and distinct from the kind of business conducted by many of the 'securities corporations', and it would be difficult, if not impossible, for the same set of officers to conduct safely, soundly, and successfully the conservative business of the national bank and at the same time direct and manage the speculative ventures and promotions of the ancillary institutions. These varying institutions demand a different kind of ability and experience on the part of those who manage them, and the two types of business when combined with one management are likely to be operated to the advantage of neither.

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"These ancillary companies are being used with increasing frequency for promotion of speculation and for dealing in bonds and stocks, often those of new and unseasoned issues, and which are attended with improper hazard risk, and as a means of enabling

banks to do, indirectly through their instrumentality, things which they can neither safely nor lawfully do directly." [See Hearings Pursuant to S. Res. 71 Before a Subcommittee of the Senate Committee on Banking and Currency, 71st Cong. 3d Sess. pp. 1067-1068 (1931)]

The Senate Subcommittee Report also outlined the organization and functions of the security affiliates. Among one of these functions was the operation of investment trusts which bought and sold securities purely for investment or speculative purposes, Hearings, S.Res. 71, p. 1057. These investment trusts were the equivalent of our present day investment companies.[14]

Another drawback which the Subcommittee Report recognized was that "in the case of a trust company or a bank with a trust department, the possession of a security affiliate may adversely affect the independence with which fiduciary activities are exercised." Hearings, S.Res. 71, p. 1064.

There can be little doubt as to what Congress intended to do by the enactment of the Glass-Steagall provisions outlined above. Section 16, 12 U.S.C. § 24, par. 7 prohibits national banks from not only underwriting securities directly but also limits the capacity of the national banks in the purchase and sale of securities. Awotin v. Atlas Exchange Bank, 295 U.S. 209, 55 S.Ct. 674, 79 L.Ed. 1393 (1935); cf. United States v. Philadelphia National Bank, 374 U.S. 321, 329, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963), First Natl. Bank in St. Louis v. State of Missouri, 263 U.S. 640, 44 S.Ct. 213, 68 L.Ed. 486 (1923), Genessee Trustee Corp. v. Smith, 102 F.2d 125, 127 (6th Cir. 1939), Guaranty Trust Co. v. United States, 44 F.

[14] S.E.C. Report on the Public Policy Implications of Investment Company Growth, H.R.Rep.No. 2337, 89th Cong. 2nd Sess. p. 33, Fn. 3 (1966).

Supp. 417, (E.D.Wash. 1942), affirmed 139 F.2d 69 (9th Cir. 1943), United States v. Palmer, 28 F.Supp. 936 (S.D.N.Y. 1939). Section 20, 12 U.S.C. § 377 effectively provides that national banks may not be affiliated with an entity which is engaged principally in the business of purchasing, selling, or underwriting securities. Section 21, 12 U.S.C. § 378 specifically provides that it is unlawful for any entity which is engaged in the business of purchasing, selling, or underwriting to also be engaged in the banking business. Section 32, 12 U.S.C. § 78 prohibits banks and investment organizations from having interlocking directorates, and common officials and employees. Through this legislative scheme Congress intended to separate these previously integrated activities, and it made its intent explicitly clear. Merchants National Bank of Mobile v. Commissioner of Internal Revenue, 199 F.2d 657 (5th Cir. 1952); Commissioner of Internal Revenue v. Merchants Nat. Bldg. Co., 131 F.2d 740, 741 (5th Cir. 1942); cf. Paramount Pictures v. Langer, 23 F.Supp. 890, 902 (D.N.D. 1938), reversed as moot 306 U.S. 619, 59 S.Ct. 641, 83 L.Ed. 1025 (1938), Morgan Stanley & Co. v. S.E.C., 126 F.2d 325, 329 (2nd Cir. 1942).

The Supreme Court has stated with specific relation to Section 32, 12 U.S.C. § 78, that "It [Section 32] is a preventive or prophylactic measure. The fact that respondents have been scrupulous in their relationship to the bank is therefore immaterial," Board of Governors of Federal Reserve System v. Agnew, 329 U.S. 441, 449, 67 S.Ct. 311, 415, 91 L.Ed. 408 (1946), see also United States v. Brown, 381 U.S. 437, 454, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965). This "prophylactic" aspect of Section 32 is also inherent in Sections 20 and 21. This is effective legislation against temptation, National Maritime Union of America v. Herzog, 78 F.Supp. 146, 171 (D.C.D.C. 1948) affirmed 334 U.S. 354 (1948), and it should not be derogated except by the Congress.

The Comptroller contends that the Account has been passed upon and approved by the Federal Reserve Board of Governors as far as its establishment would be contrary to the provisions of Section 32, 12 U.S.C. § 78.[15] In order to support its conclusion the Board promulgated a "single entity" theory, that is, that the Bank and the Account would constitute a single entity for the purposes of Section 32, since the Account would be regarded as nothing more than an arm or department of the Bank. This proposition seems to be based more on nuances of language than on the factual ascertainment of the relationship of the Account with the Bank. The Account is to be governed by an independent board of directors, the Committee, with full policy making authority. The Committee is elected by a majority of the units of participation in the Account and is responsible only to the investor-participants in the Account and not to the Bank. The Bank serves as investment adviser to the Account and also provides administrative services. It performs these services pursuant to a contract which conforms to the requirements of Section 15 of the Investment Company Act, 15 U.S.C. § 80a-15. The contract is terminable at any time, by either party, with sixty days notice and may be continued only upon annual approval of the invest or-participants or of a majority of the Committee, including a majority of the members of the Committee not affiliated with the Bank. The contract will also terminate automatically if assigned by the Bank. When all these factors are taken into consideration, it is obvious that the Bank is contractually affiliated with the Account and cannot, therefore, be considered a department of the bank.[16] The

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[15] Hearings, S. 2704 (1966) p. 580-588, supra.

[16] Under the provisions of the Account, the participants or a majority of the independent members of the Committee could sever relations with the Bank by electing not to renew the contractual management agreement; practically this may never occur; however, it is possible under the present structure of the Account.

prophylactic provision of Section 32 prevents the Bank from being affiliated with the Account.

Furthermore, since it is the conclusion of this court that the Account is in fact an investment fund, the complementary provisions of Sections 20 and 21, 12 U.S.C. §§ 377 and 378, prohibit the Account from being affiliated with the Bank and the Bank from being affiliated with the Account.

The Comptroller further contends that the inherent dangers with which the integration of these financial activities was previously fraught are not present in the instant relationship, since the Bank only receives a set fee for managing the Account and does not obtain any remuneration from issuing or underwriting the units of participation. This limitation in probable expected remuneration to the Bank may mitigate the possible aggressive use of the Account by the Bank, but this does not override the clear and unequivocal Congressional mandate that national banks be divorced from investment organizations.[17]

It is a legislative process which determines the newly evolving circumstances which require a change in the statutes. The courts can only enforce and interpret the legislative enactments. The statutes presently in force do not allow a national bank to establish, operate, or be affiliated with an investment fund.

In view of the statements and conclusions made above, this court holds that the provisions of Regulation 9 which allow commingling of managing agency accounts do not comply with the statutory provision of the Glass-Steagall Act and are, therefore, illegal. The promulgation of these

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[17] The possible conflicts of interests between the Account and other aspects of the bank's activities are still present, notwithstanding the precautions which were taken by the Comptroller in delineating the powers of the Account. See Banks and Mutual Funds, Comment, 20 Sw.L.J. 334, 341, 342.

specific provisions allowing a commingling of managing agency accounts is also beyond the power of the Comptroller under Section 92a(a) of Title 12, and it is ordered to be set aside.

The summary judgment motion of the defendant is denied and motion of plaintiffs is granted.

Counsel for plaintiffs will submit an Order in accordance with the foregoing.

Dated: September 27, 1967.

APPENDIX C

Judgment of the Court of Appeals

[Caption Omitted]

On Petition for Review of an order of the Securities and Exchange Commission and on appeals from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge; Wilbur K. Miller, Senior Circuit Judge; and Burger, Circuit Judge.

JUDGMENT

These causes came on to be heard on petitioner's petition for review and on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel.

Upon consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the order on review herein in case No. 20,164 is hereby affirmed and it is

FURTHER ORDERED AND ADJUDGED by this Court that the judgments of the District Court appealed from herein in case Nos. 21,661 and 21,662 are hereby reversed.

Per Curiam.

Dated: June 21, 1969

Opinions will follow at a later date.

APPENDIX D

Order of the Court of Appeals Denying Rehearing

[Caption Omitted]

Before: Bazelon, Chief Judge; and Wilbur K. Miller, Senior Circuit Judge, in Chambers.

ORDER

On consideration of appellees' petition for rehearing, it is

ORDERED by the Court that appellees' aforesaid petition is denied.

Per Curiam.

[Dated: August 15, 1969]

APPENDIX E

Statutes and Regulations Involved

1. Sections 16, 20, 21 and 32 of the Glass-Steagall Banking Act of 1933, 48 Stat. 184-85, 188-89, 194 (1933), *as amended*, 49 Stat. 707, 709 (1935), 12 U.S.C. §§ 24, 377, 378, 78 (1964) provide in pertinent part:

> SEC. 16 Paragraph "Seventh" of section 5136 of the Revised Statutes, as amended (U.S.C. title 12, sec. 24; Supp. vi, title 12, sec. 24), is amended to read as follows:
>
> "Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discontinuing and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal

security; and by obtaining, issuing and circulating notes according to the provisions of this chapter. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock: Provided, That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe. In no event shall the total amount of the investment securities of any one obligor or maker, held by the association for its own account, exceed at any time 10 per centum of its capital stock actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund, except that this limitation shall not require any association to dispose of any securities lawfully held by it on August 23, 1935. As used in this section the term "investment securities" shall mean marketable obligations, evidencing indebtedness of any person, copartnership, association, or corporation in the form of bonds, notes and/or debentures commonly known as investment securities under such further definition of the term "investment securities" as may by regulation be prescribed by the Comptroller of the Currency. Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by the association for its own account of any shares of stock of any corporation. * * * "

SEC. 20. (a) After one year from the date of the enactment of this Act, no member bank shall be affiliated in any manner described in section 2(b) hereof with

any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities.

* * *

SEC. 21. (a) after the expiration of one year after June 16, 1933, it shall be unlawful—

(1) For any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor: *Provided,* That the provisions of this paragraph shall not prohibit national banks or State banks or trust companies (whether or not members of the Federal Reserve System) or other financial institutions or private bankers from dealing in, underwriting, purchasing, and selling investment securities to the extent permitted to national banking associations by the provisions of section 24 of this title: *Provided further,* * * *

SEC. 32. No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may al-

low such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments.

* * *

2. Public Law 87-722, 76 Stat. 668 (1962), U.S.C., Title 12, § 92a (1964) provides:

(a) The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

* * *

(j) . . . The Comptroller of the Currency is authorized and empowered to promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein.

3. Regulation 9 of the Comptroller of the Currency, 12 C.F.R. § 9 (1967), provides in pertinent part:

§ 9.18 Collective investment.

(a) Where not in contravention of local law, funds held by a national bank as fiduciary may be invested collectively:

(1) In a common trust fund maintained by the bank exclusively for the collective investment and reinvestment

of monies contributed thereto by the bank in its capacity as executor, administrator, guardian or trustee under a will or deed;

(2) In a fund consisting solely of assets of retirement, pension, profit sharing, stock bonus, or other trusts which are exempt from Federal income taxation under the Internal Revenue Code;

(3) In a common trust fund, maintained by the bank exclusively for the collective investment and reinvestment of monies contributed thereto by the bank in its capacity as managing agent under a managing agency agreement expressly providing that such monies are received by the bank in trust;

(b) Collective investments of funds or other property by national banks under paragraph (a) of this section (referred to in this paragraph as "collective investment funds") shall be administered as follows:

(1) Each collective investment fund shall be established and maintained in accordance with a written plan (referred to herein as the Plan) which shall be approved by a resolution of the bank's board of directors and filed with the Comptroller of the Currency. The Plan shall contain appropriate provisions not inconsistent with the rules and regulations of the Comptroller of the Currency as to the manner in which the fund is to be operated, including provisions relating to the investment powers of the bank with respect to the fund, the allocation of income, profits and losses, the terms and conditions governing the admission or withdrawal of participations in the fund, the auditing of accounts of the bank with respect to the fund, the basis and method of valuing assets in the fund, the minimum frequency for valuation of assets of the fund, the period following each such valuation date during which the valuation may be made, the basis upon which the fund may be terminated, and such other matters as may be necessary to define clearly the rights of participants in the fund: *Pro-*

vided, That Plans which have been established in conformance with prior regulations of the Board of Governors of the Federal Reserve System or the Comptroller of the Currency may continue to conform to such regulations rather than the requirements of this paragraph, for a reasonable period. A copy of the Plan shall be available at the principal office of the bank for inspection during all banking hours, and upon request a copy of the Plan shall be furnished, to any person.

(2) Monies held by the bank in its capacity as managing agent shall not be invested in collective investment funds established under the provisions of paragraph (a) (1) or (2) of this section. Property held by the bank in its capacity as trustee of retirement, pension, profit sharing, stock bonus or other trusts which are exempt from Federal income taxation under the Internal Revenue Code may be invested in collective investment funds established under the provisions of paragraph (a) (1) or (2) of this section, subject to the provisions herein contained pertaining to such funds. Assets of retirement, pension, profit sharing, stock bonus or other trusts which are exempt from Federal income taxation under the Internal Revenue Code and held by the bank, in whatever capacity, may be invested in collective investment funds established under the provisions of paragraph (a) (2) of this section.

(3) All participations in the collective investment fund shall be on the basis of a proportionate interest in all of the assets. In order to determine whether the investment of funds received or held by the bank as fiduciary in a participation in a collective investment fund is proper, the bank may consider the collective investment fund as a whole and shall not, for example, be prohibited from making such investment because any particular asset is non-income producing.

(4) Not less frequently than once during each period of three months a bank administering a collective invest-

ment fund shall determine the value of the assets in the fund as of the dates set for the valuation of assets. No participation shall be admitted to or withdrawn from the fund except (i) on the basis of such valuation and (ii) as of such valuation date. No participation shall be admitted to or withdrawn from the fund unless a written request for or notice of intention of taking such action shall have been entered on or before the valuation date in the fiduciary records of the bank and approved in such manner as the board of directors shall prescribe. No such request or notice may be cancelled or countermanded after the valuation date.

(5) (i) A bank administering a collective investment fund shall at least once during each period of 12 months cause an adequate audit to be made of the collective investment fund by auditors responsible only to the board of directors of the bank. In the event such audit is performed by independent public accountants, the reasonable expenses of such audit may be charged to the collective investment fund.

(ii) A bank administering a collective investment fund shall at least once during each period of 12 months prepare a financial report of the fund which shall be filed with the Comptroller of the Currency. This report, based upon the above audit, shall contain a list of the investments in the fund showing the current market value of each investment, a statement for the period since the last report showing purchases, sales and any other investment changes, income and disbursements, and an appropriate notation as to any investment in default.

(iii) The financial report may include a description of the fund's value on previous dates as well as its income and disbursements during previous accounting periods. The report shall make no reference to the performance of funds other than those administered by the bank, and no predictions or representations as to future results.

(iv) A copy of the financial report shall be furnished, or notice shall be given that a copy of such report is available and will be furnished without charge upon request, to each person to whom a regular periodic accounting would ordinarily be rendered with respect to each participating account. The report, in such summarized form as prescribed by the Comptroller of the Currency, shall be published in a newspaper of general circulation in the place where the principal office of the bank is located. In addition, a full report shall be furnished upon request to any person, and the fact of the availability of such material may be given publicity solely in connection with the promotion of the fiduciary services of the bank. Except as herein provided, the bank shall not advertise or publicize its collective investment fund(s). The cost of printing, publication and distribution of the report shall be borne by the bank.

(6) When participations are withdrawn from a collective investment fund, distributions may be made in cash or ratably in kind, or partly in cash and partly in kind, provided that all distributions as of any one valuation date shall be made on the same basis.

(7) If for any reason an investment is withdrawn in kind from a collective investment fund for the benefit of all participants in the fund at the time of such withdrawal and such investment is not distributed ratably in kind, it shall be segregated and administered or realized upon for the benefit ratably of all participants in the collective investment fund at the time of withdrawal.

(8) (i) A bank administering a collective investment fund shall not *(a)* have any interest in such fund other than in its fiduciary capacity (funds held by a bank as fiduciary as described under paragraph (a) (1) or (2) of this section for its own employees may be invested in such a fund) or *(b)* make any loans on the security of a participation in such fund. If because of a creditor relationship or other-

wise the bank acquires an interest in a participation in such fund, the participation shall be withdrawn on the first date on which such withdrawal can be effected. However, in no case shall an unsecured advance to an account holding a participation until the time of the next withdrawal be deemed to constitute the acquisition of an interest by the bank.

(ii) The bank may purchase for its own account from a collective investment fund any defaulted mortgage held by such fund, if in the judgment of the board of directors the cost of segregation of such mortgage would be greater than the difference between its market value and its principal amount plus interest and penalty charges due. If the bank elects to so purchase the mortgage it must do so at its market value or at the sum of principal, interest and penalty charges, whichever is greater.

(9) Except in the case of collective investment funds described in paragraph (a) (2) of this section:

(i) No funds or other property shall be invested in a participation in a collective investment fund if as a result of such investment the participant would have an interest aggregating in excess of ten per cent of the then market value of the fund: *Provided*, That in applying this limitation if two or more accounts are created by the same person or persons and as much as one-half of the income or principal of each account is payable or applicable to the use of the same person or persons, such accounts shall be considered as one;

(ii) No investment for a collective investment fund shall be made in stocks, bonds or other obligations of any one person, firm or corporation if as a result of such investment the total amount invested in stocks, bonds or other obligations issued or guaranteed by such person, firm or corporation would aggregate in excess of ten percent of the then market value of the fund: *Provided*, That this limitation shall not apply to investments in direct obligations of the

United States or other obligations fully guaranteed by the United States as to principal and interest;

(iii) Any bank administering a collective investment fund shall have the responsibility of maintaining in cash and readily marketable investments such part of the assets of the fund as shall be deemed to be necessary to provide adequately for the needs of participants and to prevent inequities between such participants, and if prior to any admissions to or withdrawals from a fund the bank shall determine that after effecting the admissions and withdrawals which are to be made less than 40 percent of the value of the remaining assets of the collective investment fund would be composed of cash and readily marketable investments, no admissions to or withdrawals from the fund shall be permitted as of the valuation date upon which such determination is made: *Provided,* That ratable distribution upon all participations shall not be so prohibited in any case.

(10) The reasonable expenses incurred in servicing mortgages held by a collective investment fund may be charged against the income account of the fund and paid to servicing agents, including the bank administering the fund.

(11) (i) A bank may (but shall not be required to) transfer up to five percent of the net income derived by a collective investment fund from mortgages held by such fund during any regular accounting period to a reserve account: *Provided,* That no such transfers shall be made which would cause the amount in such account to exceed one percent of the outstanding principal amount of all mortgages held in the fund. The amount of such reserve account, if established, shall be deducted from the assets of the fund in determining the fair market value of the fund for the purposes of admissions and withdrawals.

(ii) At the end of each accounting period, all interest payments which are due but unpaid with respect to mortgages in the fund shall be charged against such reserve

account to the extent available and credited to income distributed to participants. In the event of subsequent recovery of such interest payments by the fund, the reserve account shall be credited with that amount so recovered.

(iii) Notwithstanding anything herein contained to the contrary, Mortgage Investment Funds presently being operated pursuant to the provisions of section 17(d) of prior regulations of the Comptroller of the Currency or the Board of Governors of the Federal Reserve System may continue to be operated in accordance with such prior regulations for a reasonable time. However, after April 5, 1963, no such funds shall be established.

(12) A national bank administering a collective investment fund shall have the exclusive management thereof. The bank may charge a fee for the management of the collective investment fund provided that the fractional part of such fee proportionate to the interest of each participant shall not, when added to any other compensations charged by the bank to the participant, exceed the total amount of compensations which would have been charged to said participant if no assets of said participant had been invested in participations in the fund. The bank shall absorb the costs of establishing or reorganizing a collective investment fund.

(13) No bank administering a collective investment fund shall issue any certificate or other document evidencing a direct or indirect interest in such fund in any form.

(14) No mistake made in good faith and in the exercise of due care in connection with the administration of a collective investment fund shall be deemed to be a violation of this part if promptly after the discovery of the mistake the bank takes whatever action may be practicable in the circumstances to remedy the mistake.

(c) In addition to the investments permitted under paragraph (a) of this section, funds or other property received

or held by a national bank as fiduciary may be invested collectively, to the extent not prohibited by local law, as follows:

(1) In shares of a mutual trust investment company, organized and operated pursuant to a statute that specifically authorizes the organization of such companies exclusively for the investment of funds held by corporate fiduciaries, commonly referred to as a "bank fiduciary fund".

(2) In a single real estate loan or a direct obligation of the United States, or an obligation fully guaranteed by the United States, if the bank owns no participation in the loan or obligation and has no interest therein except in its capacity as fiduciary.

(3) In a common trust fund maintained by the bank for the collective investment of cash balances received or held by a bank in its capacity as trustee, executor, administrator or guardian, which the bank considers to be individually too small to be invested separately to advantage, and the total investment in which on the part of any one account does not exceed $10,000: *Provided*, That in applying this limitation if two or more accounts are created by the same person or persons and as much as one-half of the income or principal of each account is payable or applicable to the use of the same person or persons, such account shall be considered as one: *And provided*, That no fund shall be established or operated under this subparagraph for the purpose of avoiding the provisions of paragraph (b) of this section.

(4) In any investment specifically authorized by court order or authorized by the instrument creating the fiduciary relationship: *Provided*, That such investment is not made under this paragraph for the purpose of avoiding the provisions of paragraph (b) of this section.

(5) In such other manner as shall be approved in writing by the Comptroller of the Currency.

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In the Supreme Court of the United States

October Term, 1969

No. 843

INVESTMENT COMPANY INSTITUTE, ET AL., PETITIONERS

v.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE COMPTROLLER OF THE CURRENCY IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 51a–94a) is reported at 274 F. Supp. 624. The opinion of the court of appeals (Pet. App. 1a–50a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1969, and a timely petition for rehearing was denied on August 15, 1969. The petition for a writ of certiorari was filed on November 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the operation of commingled managing agency investment accounts under regulations promulgated by the Comptroller of the Currency is within the fiduciary powers granted national banks (12 U.S.C. 92a) and consistent with the prohibitions of the Glass-Steagall Act against bank involvement in the securities business (12 U.S.C. 24, 78, 377, 378).[1]

STATUTES AND REGULATION INVOLVED

Sections 16, 20, 21 and 32 of the Glass-Steagall Act, as amended (12 U.S.C. 24, 377, 378 and 78); 12 U.S.C. 92a; and Regulation 9 of the Comptroller of the Currency (12 C.F.R. 9), are set out in pertinent part in Appendix E to the petition (Pet. App. 95a–106a).

STATEMENT

Petitioners, an association of mutual funds, investment advisers and underwriters, and certain members of that association, seek to invalidate regulations of the Comptroller of the Currency (12 C.F.R. 9.18), which permit national banks to operate commingled managing agency investment accounts on specified terms. In particular, they seek to enjoin the Comptroller from permitting the respondent First National City Bank to operate such an account.

A national bank with a trust department is authorized "to act as trustee, executor, administrator, registrar * * *, guardian * * *, assignee, receiver, * * * or in any other fiduciary capacity in which State banks,

[1] In the event that the petition should be granted, the Comptroller reserves the right to urge, as an alternative basis for affirmance, that petitioners lack standing to sue.

trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located" (12 U.S.C. 92a). The Federal Reserve Board, which administered this statute from 1913 until 1962,[2] allowed national banks holding trust funds or pension, profit-sharing, or stock bonus plan funds to pool such funds together when authorized to do so by the governing instrument or by local laws.[3] The commingling of such funds allowed sharing of administration expenses among the funds so pooled, thus reducing the service and management fees charged by the bank to each individual fund, and also allowed the diversification of assets required for a sound investment program (J.A. 214–215).

Another longstanding fiduciary service authorized by 12 U.S.C. 92a is the "managing agency," under which the bank buys, sells and holds common stock and other securities for the account of a customer pursuant to an agreement making the bank the customer's agent.[4] Before 1962 the Federal Reserve Board did not permit such managing agency funds to be pooled and administered together, and thus it was not economically feasible for a bank to accept a managing agency account of less than $100,000 because the cost of managing a smaller account was not covered by

[2] During this period this statute was found at 12 U.S.C. 248(k).

[3] See 1937 Fed. Reserve Bull. 392; 20 F.R. 3305 (1955).

[4] See J.A. 214; 1934 Fed. Res. Bull. 609; 1 Scott, *Trusts* (3d ed.) § 8.1. pp. 80–81. 12 U.S.C. 24 Seventh provides in part that national banks may deal in securities and stock "upon the order, and for the account of, customers * * *."

the usual charge of approximately one-half of one percent annually (J.A. 214–215, 221–222).

In 1962 Congress transferred the supervision of the trust activities of national banks from the Federal Reserve Board to the Comptroller of the Currency. 76 Stat. 668. The Comptroller thereafter requested all affected banks to submit recommendations as to how the then existing fiduciary regulations might be improved (J.A. 213). The response was voluminous, and the Comptroller appointed a committee of experts to study those regulations and recommend revisions (*ibid.*; 42 Trust Bulletin No. 6, p. 10 (1963)). Based upon this committee's recommendations, new regulations were proposed, and among them was a proposed authorization for the pooling and collective investment of funds held by banks in the capacity of managing agent (J.A. 216; 28 F.R. 1111 (1963)).[5] After receiving and considering comments, including those of the petitioner Investment Company Institute, the Comptroller promulgated a new set of regulations to govern the trust activities of national banks (12 C.F.R., Part 9), and these regulations included authorization, on specified terms, for the collec-

[5] The Federal Reserve Board had been considering a similar authorization for some time before the supervision of trust activities was transferred to the Comptroller, but the Board "had not come to the conclusion that this was a desirable thing at the time the transfer was made." Testimony of Chairman Martin, Hearings on H.R. 8499 and H.R. 9410 before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 88th Cong., 2d Sess., p. 108 (1964).

tive investment of managing agency funds (12 C.F.R. 9.18(a)(3)).

The Securities and Exchange Commission also considered such commingled accounts from its regulatory viewpoint, and concluded that—in addition to the protections enumerated in the Comptroller's regulations and further provided by his regular bank examinations—bank customers participating in such accounts should also be protected under the Investment Company Act of 1940 and the Securities Act of 1933. Thus, it concluded that, for S.E.C. purposes, a commingled account should be treated as an investment company and the participants should be given certificates of interest registered with the Commission as securities (see J.A. 217). The addition of these S.E.C. regulatory requirements created some technical inconsistencies with the Comptroller's regulations. For example, the Comptroller required a bank administering such a collective investment fund to have "the exclusive management thereof" (12 C.F.R. § 9.18(b)(12)); but the Investment Company Act contemplated governance by a board of directors, a majority of whom could not be affiliated with the managing bank (see 15 U.S.C. 80a-10 (b)(3), (c)). Similarly, the Comptroller's regulations prohibited the issuance of any certificate or other document "evidencing a direct or indirect interest in such fund" (12 C.F.R. 9.18(b)(13)), while the Securities Act required certificates to be issued and registered with the S.E.C.

The respondent First National City Bank prepared a plan for a commingled managing agency account

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which the Bank believed would satisfy all of the various pertinent regulatory requirements. A customer with $10,000 or more [6] which he wished to be managed by the Bank would execute a written agreement appointing the Bank managing agent and specifically authorizing the customer's funds to be commingled with those of other customers signing similar agreements (J.A. 181). The customer would receive a document stating the number of "units of participation" he held as an undivided interest in the pooled fund (J.A. 152). The fund would be governed by a committee of five persons elected annually by the participants; the original committee would include three officers of the Bank, and it was contemplated that a majority of the committee would continue to be Bank officers (J.A. 115, 176, 177–178, 229). The Bank was to be the investment adviser to the collective fund and the custodian of its assets; for purposes of the securities laws, the Bank would also be considered to be an underwriter of the units of participation (J.A. 119–123, 154–165). The units of participation would be registered with the S.E.C. as securities (see J.A. 108–151) and a prospectus made available to potential investors (see J.A. 168–180).

This plan was filed with and found satisfactory by the three federal agencies concerned. The Comptroller found that the Bank would be exclusively responsible

[6] This $10,000 minimum is not required by the Comptroller's regulation. The Comptroller's Office advises us that one national bank has submitted to the Comptroller and the S.E.C. for approval a collective investment fund, similar to the one here involved, with a $5,000 minimum, and another national bank is actively considering a $2,500 minimum.

for the operation of the collective investment fund and would administer it just as it would any other trust service. The Comptroller therefore granted to the fund a specific approval under 12 C.F.R. 9.18(c)(5), thus allowing the fund to be established with some modifications of the pattern set forth in 12 C.F.R. 9.18 (J.A. 220–232). The Federal Reserve Board likewise viewed the fund as a part of the Bank for purposes of the banking laws, and therefore ruled that the participation of Bank officers on the committee of the fund would not be an affiliation with an issuer of or dealer in securities prohibited by Section 32 of the Glass-Steagall Act, 12 U.S.C. 78 (see 12 C.F.R. 218.111).[7] The S.E.C. found that the Comptroller's regulations provided sufficient protection to participants in the collective investment fund to justify the granting of certain exemptions from the Investment Company Act that would, *inter alia,* permit a majority of the account's governing board to be Bank officers.[8]

In accordance with the approval granted by these

[7] With respect to the question whether Section 21 of the Glass-Steagall Act applies, the Board's ruling "expressed no position," explaining that "since section 21 is a criminal statute, the Board has followed the policy of not expressing views as to its meaning." 12 C.F.R. 218.111(k).

[8] See Hearings on S. 2704, Collective Investment Funds, before a Subcommittee of the Senate Committee on Banking and Currency, 89th Cong., 2d Sess., pp. 81–90 (1966).

In another phase of the attack by the mutual fund industry against alleged encroachment by banks, the National Association of Securities Dealers, Inc. (NASD), intervened before the Securities and Exchange Commission to oppose the granting of exemptions from the Investment Company Act. Having been unsuccessful before the Commission, the Association petitioned for review in the court below. In an opinion consolidated with the opinion in this case, the court of appeals held that the

three federal agencies, the Bank established a commingled managing agency account in 1966 and that account is now in operation (J.A. 226–227). Petitioners then brought this action for declaratory and injunctive relief, seeking to have the Comptroller's regulations declared unlawful and the continued operation of the Bank's plan prohibited.

The district court granted petitioner's motion for summary judgment, holding that "the provisions of Regulation 9 which allow commingling of managing agency accounts do not comply with the statutory provision [*sic*] of the Glass-Steagall Act and are, therefore, illegal" (Pet. App. 93a). The court of appeals unanimously reversed (Pet. App. 2a–3a). In a brief *per curiam* opinion, the court stated that, "[o]n the merits, we are agreed that the actions taken by the Securities and Exchange Commission and the Comptroller are fully consonant with the statutes committed to their regulatory jurisdictions" (Pet. App. 3a). The members of the panel went on to elaborate their views in separate concurring opinions, one by Chief Judge Bazelon and another by Judge Burger, with whom Judge Miller joined.

Chief Judge Bazelon's opinion discussed in detail each of the aspects of the case (Pet. App. 4a–25a), and concluded that "the [commingled managing agency] Account, subject to the mutually reinforcing regulations imposed by the Comptroller and the Com-

---

Commission had been correct in granting the exemptions (Pet. App. 17a–25a). The NASD has filed a petition for a writ of certiorari with respect to that decision below (No. 835, this Term), and the Solicitor General is filing a separate response thereto on behalf of the S.E.C.

mission, was established in accordance with law" (Pet. App. 4a). Judge Burger's majority concurring opinion expressed the view that (Pet. App. 49a–50a):

> Our review function is narrow and limited; it does not include the power to decide whether the public will be better served by one or the other modes of investing funds so as to achieve diversification, yield, safety or low cost. All that is the primary responsibility of the special regulatory bodies established by Congress for that purpose. * * *
>
> Here the Comptroller of the Currency, after study, has decided that the commingled managing agency account is a function which is authorized by law for banks and is in the public interest; the Securities and Exchange Commission and the Federal Reserve Board have approved. Other state and federal regulatory bodies are in accord. The regulatory bodies charged by Congress with these large responsibilities have construed the grant of power and with their accumulated expert experience have decided these issues. Their decisions are entitled to substantial deference and on this record I see no basis for disturbing their conclusions.

Consequently, Judges Burger and Miller were also of the view that the district court's judgment should be reversed on the merits.[9]

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[9] While Judges Burger and Miller expressed their "grave doubts" as to petitioners' standing to maintain the action, they nevertheless decided to resolve those doubts in petitioners' favor (Pet. App. 49a). Judge Bazelon was of the view that petitioners have standing (Pet. App. 25a–37a).

ARGUMENT

The decision of the court of appeals is manifestly correct (putting the question of standing to one side), and there is no claim of a conflict with any other decision. Consequently, there is no reason for further review.

1. As the majority concurring opinion below pointed out, "[i]n one form or another banks have been holding, managing and investing funds for customers for a long time" (Pet. App. 50a). For example, at least since 1934 when the Federal Reserve Board and the Comptroller of the Currency gave their specific approval, national banks have acted as managing agents for the purpose of buying, selling, and holding common stock or other securities for the account of individual bank customers pursuant to an agreement making the bank the customer's agent (see p. 3, *supra*). In addition, national banks have managed trust accounts possessing securities since 1915 (38 Stat. 262; 1 Fed. Reserve Bull. 43 (1915)) and, since 1937, have been permitted to commingle the assets of such accounts and to administer them in a common trust fund (see p. 3, *supra*).[10] Petitioners do not, and cannot, object to the legality of these longstanding bank services.

There is nothing novel either in the concept or in the practical operation of a commingled managing agency investment account. It is designed simply to

[10] In fact, such funds were approved as early as 1927 by the Comptroller and the Federal Reserve Board. See the description of the Security National Bank Bond Investment Trust in Saxon and Miller, *Common Trust Funds*, 53 Geo. L.J. 994, 997 (1965).

make available to the smaller investor (in this case one with $10,000 to invest) the benefit, previously available only to large investors through individual managing agency accounts, of having their investments managed by a bank trust department. Indeed, since the bank acts as a fiduciary in managing the commingled investment account, there is no practical distinction, in the bank's activities, from the management of a common trust fund.

Petitioners' objection that a national bank may not utilize a commingled managing agency account to provide the same services it has long been permitted to offer to both large investors (through individual accounts) and smaller investors (through common trust funds) is premised entirely upon the proposition that the "units of participation" represented by a certificate that First National City Bank gives each participant amount to "securities" within the meaning of the Glass-Steagall Act. Specifically, they point to Sections 16, 20, 21 and 32 of that Act, 12 U.S.C. 24, 377, 378 and 78, which limit banks to purchasing and selling "securities" only for the account of customers and prohibit direct or indirect affiliations between banks and issuers, underwriters, sellers or distributors of "securities." But the issuance of the certificates that petitioners now call "securities" is not an inherent aspect of a bank's operation of a collective managing agency account. Indeed, the Comptroller's basic regulations prohibited the issuance of any such certificates and the only reason for their existence—and the Comptroller's special permission therefor—is the S.E.C.'s determination that participants in such

accounts should be afforded additional protections under the Investment Company Act of 1940 and the Securities Act of 1933. The certificates (which are not transferable) do no more than indicate the amount of undivided interest each participant has in the commingled account (J.A. 152). The fact that the S.E.C. requires, for its own regulatory purposes, that such certificates be issued and registered under the Securities Act is plainly irrelevant to the question whether the operation of the account amounts to doing a prohibited "securities" business within the meaning of the Glass-Steagall Act.

The court below properly found no conflict between the operation of a commingled managing agency account and the purposes of the Glass-Steagall Act. As Judge Bazelon explained in his concurring opinion, the limitations upon securities dealings by banks were addressed to three problems (Pet. App. 12a):

> (1) Banks commonly invested their own assets in securities, risking commercial and savings deposits if the securities declined in value.
>
> (2) Direct bank investment in securities created pressure for banks to make unsound loans to maintain the price of securities or the financial position of companies in which the bank had holdings.
>
> (3) Large city banks frequently acted as issuers, or underwriters of blocks of securities, distributing them at a profit through correspondent country banks. The banks' pecuniary interest in the ownership, price, or distribution

> of securities created incentive to steer customers into investing in what the banks had to sell. [Footnotes omitted.]

Judge Bazelon went on to review each of these concerns and determined that the dangers envisioned by Congress are not present in the operation of a commingled investment account. This is because the bank involved does not invest any of its own (*i.e.*, its depositors') money in the securities purchased by the commingled fund [11] and the bank sells nothing but the same investment advice available through its other trust services (and from which it receives only a clearly disclosed management or advisory fee). In short, Congress did not intend by the Glass-Steagall Act to prohibit banks from giving investment advice to their customers through their trust departments, and that is basically all that is involved here.

Petitioners' argument is fundamentally circular. Although the basic bank activity here in question is entirely consistent with the purposes of the Glass-Steagall Act, they contend that the addition of the wholly separate requirements of the securities laws (resulting in the issuance of "securities") creates a situation in which the activity violates the technical language of that Act. But for the securities laws, however, there would be no document that petitioners could call a "security" in the terms of the Glass-Steagall Act. It is simply a nonsequitur to say that the securities laws can convert a commingled man-

[11] The Comptroller prohibits a bank administering a collective investment fund from having any direct interest in such a fund. 12 C.F.R. 9.18(b)(8)(i).

aging agency account into something that is illegal under the banking laws.

In any event, there is no substance to petitioners' contention that the definition of the term "securities" as used in the Securities Act of 1933 should be carried over to the administration of the Glass-Steagall Act. We submit that the conclusion of Judge Bazelon on this point is inescapable (Pet. App. 11a–12a):

> The words security and underwriter in the Securities Act of 1933 are terms of art with a high gloss. Their expansive definitions under the Securities Act cannot be imported wholesale into the Glass-Steagall Act when the two statutes serve different purposes, in different contexts of risk to the public. The securities laws are intended to protect investors, primarily through disclosure requirements. Their terms have been interpreted broadly to afford their protection to purchasers of all manner of investment interests, wherever it is needed. The Glass-Steagall Act, by contrast, was enacted to protect bank depositors and the banking system from the risk of insolvency incident to widespread investment of banks' assets in speculative securities during the twenties. * * *

It should be noted in this connection that acceptance of petitioners' unsupported assertion that the term "securities" must be given the same meaning for the purpose of all statutes—in total disregard of differing legislative objectives—would outlaw not merely commingled managing agency accounts. The definition of "security" in the Securities Act of 1933, 15 U.S.C. 77b, is sufficiently broad to include many banking

transactions such as the issuance of a savings and loan association passbook (*Tcherepnin* v. *Knight*, 389 U.S. 332) and the sale by a bank of a loan participation (*Lehigh Valley Trust Co.* v. *Central National Bank of Jacksonville*, 409 F. 2d 989 (C.A. 5)). While, because of special exemptions in the securities laws, these documents need not be registered with the S.E.C., nevertheless they are "securities" for the purposes of those laws and thus under petitioners' theory could not be issued by a banking institution because of the proscriptions of the Glass-Steagall Act. Surely Congress did not intend any such result to flow from the enactment of that statute.[12]

2. Once it is determined that the operation of commingled managing agency accounts is thus consistent with the applicable statutes, it is apparent that the complex questions remaining about their appropriateness in general and the circumstances and conditions under which they should be permitted are questions

[12] Petitioners devote little attention in the petition to their contention below that the commingled managing agency account is not authorized by 12 U.S.C. 92a, which confers fiduciary powers upon national banks. In any event, the contention is without merit. It is clear that the Bank is acting in a "fiduciary capacity" within the meaning of that Section, as the Comptroller found. See *Brown* v. *Christman*, 126 F. 2d 625 (C.A.D.C.); *Restatement of Agency* (Second), §§ 13, 14B and comment a; 1 Scott, *Trusts* (3d ed.) § 8. Moreover, there is no question but that the activity here in question is open to competing state banks under New York law, as required by 12 U.S.C. 92a. New York Banking Law, § 100-c; *Brooklyn Trust Co.* v. *Corwin*, 5 F. Supp. 287, 289 (E.D. N.Y.). And the New York State Banking Department has given its formal sanction to the commingling of managing agency accounts in New York (Pet. App. 8a). Therefore, no serious question can be raised concerning a violation of 12 U.S.C. 92a.

for the federal agencies involved, subject to Congressional supervision. The Comptroller of the Currency, the Federal Reserve Board and the Securities and Exchange Commission have each studied this matter at great length and have found the commingled managing agency account established by First National City Bank to be a proper and useful activity for that bank. The Comptroller and the S.E.C. have continuing regulatory supervision over the account. Each of these three agencies has testified at length before Congressional committees concerning these matters,[13] and each house of Congress has demonstrated its awareness of the problems by passing bills dealing with the subject.[14]

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[13] Hearings on S. 34 and S. 296, Investment Company Amendments Act of 1969, before the Senate Committee on Banking and Currency, 91st Cong., 1st Sess., pp. 5, 27, 41, 288 (1969); Hearings on H.R. 14742, Bank and Insurance Company Collective Investment Funds and Accounts, before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess., pp. 20, 112 (1968); Hearings on Amendment No. 438 to S. 1659, Mutual Fund Legislation of 1967, before the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., pp. 1226, 1228, 1296 (1967); Hearings on S. 2704, Collective Investment Funds, before a Subcommittee of the Senate Committee on Banking and Currency, 89th Cong., 2d Sess., pp. 24, 130, 132 (1966); Hearings on H.R. 8499 and H.R. 9410, Collective Investment Funds, before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 88th Cong., 2d Sess., pp. 8, 22, 103 (1964); Hearings on Common Trust Funds—Overlapping Responsibility and Conflict in Regulation, before a Subcommittee of the House Committee on Government Operations, 88th Cong., 1st Sess., pp. 3, 32 (1963).

[14] S. 2224, passed by the Senate on May 26, 1969, apparently specifically authorizes operation of the commingled managing

For these reasons, the majority concurring opinion properly placed considerable reliance upon the judgment of the "regulatory bodies charged by Congress with these large responsibilities" of supervising banks and protecting investors (Pet. App. 50a). See *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 153–154; *Inland Waterways Corp.* v. *Young*, 309 U.S. 517, 524. The courts should not interfere with their judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1969.

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agency account here involved, while H.R. 6778, passed by the House of Representatives on November 5, 1969, apparently specifically prohibits the operation of such an account.

U.S. GOVERNMENT PRINTING OFFICE: 1969

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 843

INVESTMENT COMPANY INSTITUTE, ET AL., *Petitioners*,

v.

WILLIAM B. CAMP, Comptroller of the Currency;
FIRST NATIONAL CITY BANK, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY BRIEF

Nothing in the Briefs for Respondents in any way detracts from the unanimous conclusion of the Court of Appeals that "in cases of this consequence" there is a "need for judicial examination of the important questions raised" (per curiam opinion, Pet., p. 3a; minority concurring opinion, Pet., p. 4a; majority concurring opinion, Pet., pp. 37a, 49a).[1] Indeed,

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[1] The Brief for the Comptroller of the Currency in Opposition will be referenced to herein as "Comp. Br." The Brief for Respondent First National Bank ("the Bank") will be referred to herein as "Bank Br." The Petition for Certiorari will be referred to as "Pet." and the Joint Appendix filed in the Court of Appeals as "J.A."

Chief Justice (then Judge) Burger set aside his doubts as to Petitioners' standing

> "in order to make a majority holding for review of the merits of a subject of such importance. I do so in order to reach consideration of the merits for such aid as some examination at our level may be useful to further judicial review." (Majority concurring opinion, Pet., p. 37a.)

There are only three points raised by Respondents to which a brief reply need be made.

First, contrary to Respondents' central assertion, this is clearly not a case challenging discretionary action of a federal official in which Petitioners are asking this Court to "substitute its judgment for administrative rulings upon matters within the expert competence of the regulatory agencies" (Bank Br., p. 10; Comp. Br., pp. 16, 17). Petitioners contend that the Comptroller has acted in direct violation of the Glass-Steagall Act and otherwise in excess of his statutory authority. In such a case, as we earlier pointed out (Pet., pp. 17-18), it is the responsibility of the courts to determine the lawfulness of the Comptroller's actions and the limits of his authority. This principle has been most recently reaffirmed by this Court in *The First National Bank* v. *Dickinson,* Nos. 19 and 34, October Term 1969, where the Court reversed the Comptroller's interpretation of a technical banking term ("branch") over the Comptroller's assertion that the definition was a matter of expert judgment committed to his discretion.[2] Likewise, on the only prior occasion in which the Glass-Steagall Act has been considered here, this Court, in an opinion by Mr. Justice Douglas, made its own determination of

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[2] See Brief for the Comptroller of the Currency, Nos. 19 and 34, October Term, 1969, pp. 42-43.

the meaning of a technical term in the Act. See *Board of Governors* v. *Agnew*, 329 U.S. 441 (1947).[3]

Second, Respondents have not successfully challenged Petitioners' showing that certiorari should be granted to establish a definitive interpretation of the critical prohibitions of Glass-Steagall. Nothing in Respondents' Briefs casts any light on the construction of these prohibitions so as to dispel the ambiguity which has been created by the Court of Appeals' decision (see Pet., p. 15).[4] Petitioners have demonstrated (Pet., pp. 20-22) that "units of participation" issued by the Bank's Account are "securities" as that term is used in the Glass-Steagall Act. The Federal Reserve Board has concurred that such units are "'securities' under Section 32" of the Act, just as shares

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[3] In any event, the memorandum of the Securities and Exchange Commission in the related action in No. 835, raises a serious question as to how definitive was the agency review upon which Respondents rely. This review admittedly did not reach a number of central Glass-Steagall questions. Moreover, the Commission has now stated that there "is no assurance that the Commission would reach the same judgment [exempting certain of the Bank's activities from the Investment Company Act] if a similar matter is again presented." Memorandum for the Securities and Exchange Commission, *National Association of Securities Dealers* v. *Securities and Exchange Commission*, No. 835, October Term, 1969, p. 4, n. 4. The Commission has acknowledged that "the major problem" in this dispute is "the consistency of the Account as constituted with the banking laws"; it has even conceded that if certiorari is granted here, it should also be granted in No. 835. *Id.*, at p. 4.

[4] Significantly, the Comptroller does not even attempt to define the term "security" as used in the Glass-Steagall Act. The Bank's attempt to limit it to "instruments of the type which are commonly sold in securities markets and in which the Bank might have an interest" (Bank Br., p. 12) would exclude instruments which everyone concedes are "securities" for Glass-Steagall purposes. Thus, shares in an ordinary mutual fund are not traded on securities markets; and, the distribution of shares in a no-load mutual fund yields no underwriting profit.

in mutual funds have always been so regarded.[5] The Comptroller's only response is to raise the strawman that Petitioners have asserted that the definition of "securities" in the Securities Act of 1933 must be "carried over" to the Glass-Steagall Act (Comp. Br., p. 14). His attempt to demolish that strawman is limited to pointing to legitimate banking instruments which are included within the broad definition of "security" in the Securities Act (Comp. Br., pp. 14-16). The fact is that Petitioners do not rely upon the Securities Act definition.[6] Furthermore, formal characteristics—that the units of participation are not transferable or that no printed certificates were to be issued under the initial form of the challenged regulations (Comp. Br., pp. 11-12)—do not detract from the conclusion the units are "securities"; indeed, these same characteristics can be found in garden-variety mutual funds.[7] By any standard, units of participation—representing pro rata shares in an investment medium which are offered and sold to the general public—are securities as that term is used in the Glass-Steagall Act. Thus, the Court is faced with important issues of statutory construction—issues which go to the breadth of the prohibitions of Glass-Steagall.

Third, although Respondents attempt to cast the entry by commercial banks into the mutual fund business as only an imperceptible extension of banks' tra-

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[5] See Hearing on S. 2704 before a Subcommittee of the Senate Committee on Banking and Currency, 89th Cong., 2d Sess. (1966), pp. 583, 584.

[6] See Pet., p. 22, n. 29.

[7] Virtually no shares in mutual funds are traded from one investor to another, and there is no significant trading market for such shares. (J.A. 236-37) Also, as a matter of convenience, "a growing number of [mutual] funds provide a single open account arrangement for all investors . . . [and] [n]o stock certificates are issued to any shareholder unless specifically requested." Wiesenberger, Investment Companies 1969 (1969), p. 35.

ditional fiduciary activities, it is clear that this "new and free-wheeling form of fiduciary activity" (minority concurring opinion, Pet., p. 9a) cannot be squared with the prohibitions of the Glass-Steagall Act and does not constitute bona fide fiduciary activity under national banking laws. Respondents argue that a collective investment fund is merely a mingling of the accepted activity of managing individual investment accounts on the basis of giving particular attention to the personal and financial needs of each individual client, on the one hand, and the traditional bank role of supervising common trust funds for the economical investment of assets received by the bank in the capacity of "trustee, executor, administrator or guardian," on the other hand. Indeed, the Brief for the Comptroller suggests that banks have long been permitted to offer investment services to smaller investors through common trust funds (Comp. Br., p. 11). On the contrary, however, the Federal Reserve Board consistently rejected efforts of banks to transform bona fide common trust funds to a medium of general public investment, holding that trust powers

> "should not be used to enable a trust institution to operate a Common Trust Fund as an investment trust attracting money seeking investment alone and to embark upon what would be in effect the sale of participations in a Common Trust Fund to the public as investments." 26 Fed. Reserve Bull. 393 (1940).[8] (See Pet., p. 27.)

[8] Immediately prior to the transfer to the Comptroller of jurisdiction over trust activities of national banks, the Board was considering whether its common trust fund regulations should be tightened even further to exclude revocable inter vivos trusts so as to implement more effectively the prohibition against "the use of [common trust] funds as a medium attracting individuals primarily seeking investment management of their funds." 25 Fed. Reg. 12479 (1960).

What the Comptroller has authorized is no mere extension of traditional fiduciary activities. It is a "package deal offered to all comers" (minority concurring opinion, Pet., p. 10a); there is an "absence of an individually negotiated agreement" between the Bank and the beneficiary, the hallmark of bona fide fiduciary activity. (*Id.*, Pet., p. 9a.) However Respondents might wish to label these activities, there is nothing in Respondents' Briefs to detract from Petitioners' showing that the Glass-Steagall Act was intended by Congress to preclude banks from engaging in the very type of activity which the Comptroller's regulations would permit. (See Pet., pp. 27-31.) This Court should grant certiorari to ensure that the Congressional policies reflected in these basic regulatory statutes are not circumvented by administrative action.

* * *

For the reasons set forth in the Petition and in this Reply Brief, a writ of certiorari should issue.

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January 5, 1970

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In the

Supreme Court of the United States

October Term, 1969

No. 61

Investment Company Institute, et al.,
Petitioners,

v.

William B. Camp, Comptroller of the Currency;
First National City Bank,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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12 C.F.R. §218.101 (1951) 26, 27, 30, 32
12 C.F.R. §218.102 (1960) 26, 32

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12 C.F.R. §218.104 (1961) 32
12 C.F.R. §218.104(b) (1961) 32
12 C.F.R. §218.104(c) (1961) 37
12 C.F.R. §218.105 (1961) 32
12 C.F.R. §218.107 (1963) 30, 32
12 C.F.R. §218.107(e) (1963) 26, 32
12 C.F.R. §218.111 (1965) 9, 10, 45
17 C.F.R. §270.22c-1 (1968) 12, 15

Other Authorities:

75 Cong. Rec. 9909 (1932) 22, 33, 36
75 Cong. Rec. 9912 (1932) 34, 37, 40
77 Cong. Rec. 3726 (1933) 36
115 Cong. Rec. (Daily ed., Nov. 5, 1969) 27, 30
28 Fed. Reg. 3309 (1963) 6
29 Fed. Reg. 1719 (1964) 6, 7
33 Fed. Reg. 9649 (1968) 6
19 Fed. Res. Bull. 188 (1933) 51
24 Fed. Res. Bull. 4 (1938) 53
26 Fed. Res. Bull. 393 (1940) 53
27 Fed. Res. Bull. 399 (1941) 26, 30
41 Fed. Res. Bull. 142 (1955) 53
42 Fed. Res. Bull. 228 (1956) 6, 53
Fed. Res. Bull., Mar. 1970 14
H. Rep. No. 2639, 76th Cong., 3d Sess. (1940) 52
H. Rep. No. 91-387, 91st Cong., 1st Sess. (1969) 27
H.R. 6778, 91st Cong., 1st Sess. (1969) 30
H.R. ~~4725~~ 17255, 91st Cong., 2d Sess. (1970) 30
S. Rep. No. 77, 73d Cong., 1st Sess. (1933) 36
S. Rep. No. 1455, 73d Cong., 2d Sess. (1934) 33, 36, 50
S. Rep. No. 1775, 76th Cong., 3d Sess. (1940) 52
S. Rep. No. 1351, 90th Cong., 2d Sess. (1968) 48
S. Rep. No. 91-184, 91st Cong., 1st Sess. (1969) 27

PAGE

S. 2224, 91st Cong., 1st Sess. (1969) 30
1933 Comptroller of the Currency Ann. Rep. 1 .....21, 28
1967 Comptroller of the Currency Ann. Rep. 16 ....15, 41
Bulletin of the Comptroller of the Currency, Oct. 27, 1936 28
Digest of Opinions of Comptroller of Currency, Par. 220 (April 1, 1960), 4 CCH FED. BANKING LAW ¶ 59,654 29
1934 Federal Reserve Ann. Rep. 33
Fiske, *How Banks Pass Out Commissions,* THE INSTITUTIONAL INVESTOR, Dec. 1969, at 30 43
Galbraith, *1929 and 1969—Financial Genius Is A Short Memory and a Rising Market,* HARPERS, Nov. 1969 36
Hearings on S. Res. 71 Before a Subcomm. of the Senate Comm. on Banking and Currency, 71st Cong., 3d Sess. (1931) 36
Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency, 76th Cong., 3d Sess. (1940) 52
Hearing on Common Trust Funds Before a Subcomm. of the House Comm. on Government Operations, 88th Cong., 1st Sess. 58 (1963) 8, 10, 29, 34, 38, 41, 42, 48, 52, 54
Hearings on H.R. 8499 and H.R. 9410 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 88th Cong., 2d Sess. (1964) 8, 31, 54
Hearings on S. 2704 Before a Subcomm. of the Senate Comm. on Banking and Currency, 89th Cong., 2d Sess. (1966) 8, 9, 11, 25, 27, 29, 31, 42, 46, 47, 48, 53
Hearings on Amendment No. 438 to S. 1659, Before the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. (1967) 31

PAGE

Hearings on Bank and Insurance Company Collective Investment Funds and Accounts, Investment Company Act Amendments of 1967, H.R. 14742, Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (1968) 31

Hearings on H.R. 14742 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (1968) 48

Lovell, *Trust New Business, Development by Commercial Officers*, 104 TRUSTS & ESTATES 1164 (1965) .. 42

PATON'S BANK DIGEST (American Bankers Ass'n ed. 1940) 28, 29

F. PECORA, WALL ST. UNDER OATH (1939, reprinted 1968) 22

POLK'S WORLD BANK DIRECTORY (150th ed. 1969) 14

Report of the SEC on the Public Policy Implications of Investment Company Growth, HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, H.R. REP. No. 2337, 89th Cong., 2d Sess. (1966) 13

Rev. Rul. 64-59, 1964-1 (Pt. 1) CUM. BULL. 193 8

SCOTT, LAW OF TRUSTS (3d ed. 1967) 43

SEC Investment Company Act Release No. 2621 (Oct. 31, 1957) 42

SEC Investment Company Act Release No. 4538 (Mar. 9, 1966) 9

SEC Investment Company Act, Rule 22c-1, 17 C.F.R. §270.22c-1 (1968) 12, 15

STAFF OF SUBCOMM. ON DOMESTIC FINANCE, HOUSE COMM. ON BANKING AND CURRENCY, COMMERCIAL BANKS AND THEIR TRUST ACTIVITIES, 90th Cong., 2d Sess. (1968) 39

Wall Street Journal, Feb. 26, 1964 8

17 Washington Financial Report (1970) 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 843

INVESTMENT COMPANY INSTITUTE, *et al.*,

Petitioners,

v.

WILLIAM B. CAMP, Comptroller of the Currency;
FIRST NATIONAL CITY BANK,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the District Court (A. 206) is reported at 274 F. Supp. 624. The opinion of the Court of Appeals (A. 263) is reported at 420 F.2d 83.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1969 (A. 261). A timely petition for rehearing was denied on August 15, 1969 (A. 311). This Court granted a petition for writ of certiorari on March 23, 1970. *Id.;* 90 S. Ct. 1114.

The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1). The jurisdiction of the District Court was based on 28 U.S.C. § 1331.

STATUTES INVOLVED

A. The relevant portions of the Glass-Steagall Act, as amended, are as follows:

1. Section 21, 12 U.S.C. § 378

"(a) After the expiration of one year after June 16, 1933, it shall be unlawful—

(1) For any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor: *Provided,* That the provisions of this paragraph shall not prohibit national banks or State banks or trust companies (whether or not members of the Federal Reserve System) or other financial institutions or private bankers from dealing in, underwriting, purchasing, and selling investment securities or issuing securities to the extent permitted to national banking associations by the provisions of section 24 of this title: *Provided further,* That nothing in this paragraph shall be construed as affecting in any way such right as any bank, banking association, savings bank, trust company, or other banking institution, may otherwise possess to sell, without recourse or agreement to repurchase, obligations evidencing loans on real estate . . . .

"(b) Whoever shall willfully violate any of the provisions of this section shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both, and any officer, director, employee,

or agent of any person, firm, corporation, association, business trust, or other similar organization who knowingly participates in any such violation shall be punished by a like fine or imprisonment or both."

2. Section 16, 12 U.S.C. § 24

"[A national bank] shall have power—

• • •

"Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock: *Provided,* That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe. . . .

As used in this section the term "investment securities" shall mean marketable obligations, evidencing indebtedness of any person, copartnership, association, or corporation in the form of bonds, notes and/or debentures commonly known as investment securities under such further definition of the term "investment securities" as may by regulation be prescribed by the Comptroller of the Currency. Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by the

association for its own account of any shares of stock of any corporation. The limitations and restrictions herein contained as to dealing in, underwriting and purchasing for its own account, investment securities shall not apply to obligations of the United States, or general obligations of any State or of any political subdivision thereof . . . ."

3. Section 20, 12 U.S.C. § 377

"After one year from June 16, 1933, no member bank shall be affiliated in any manner described in subsection (b) of section 221a of this title with any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities . . . .

"For every violation of this section the member bank involved shall be subject to a penalty not exceeding $1,000 per day for each day during which such violation continues. Such penalty may be assessed by the Board of Governors of the Federal Reserve System, in its discretion, and, when so assessed, may be collected by the Federal reserve bank by suit or otherwise."

4. Section 32, 12 U.S.C. § 78

"No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said

Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments."

B. The relevant portions of 12 U.S.C. § 92a are as follows:

"(a) The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

. . . .

"(j) . . . The Comptroller of the Currency is authorized and empowered to promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein."

QUESTION PRESENTED

Whether the Comptroller of the Currency may, under 12 U.S.C. § 92a, authorize national banks to operate open-end investment funds identical to mutual funds, notwithstanding those provisions of the Glass-Steagall Act which prohibit banks from engaging in the securities business?

STATEMENT

In April 1963, the Comptroller of the Currency[1] purported to authorize national banks to operate investment funds "similar in most respects to an open-end mutual fund" (A. 265). Banks have not engaged in the securities business since 1934,[2] when the prohibitions of the depression-engendered Glass-Steagall Act went into effect.

The Comptroller's claim of authority was based on a September 1962 statute which transferred supervision over national bank trust powers from the Board of Governors of the Federal Reserve System[3] ("Federal Reserve") to the Comptroller. The Federal Reserve had exercised that authority since 1913.[4] It had at no time permitted the use of common trust funds as a device to attract "individuals primarily seeking investment management of their funds." 42 FED. RES. BULL. 228 (1956). Seven months after the transfer, the Comptroller promulgated Regulation 9[5] which

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[1] The Comptroller was then James J. Saxon; his successor is Respondent William B. Camp.

[2] The exceptions relate to underwriting certain government bonds, including obligations of the United States, general obligations of states and political subdivisions, and certain other public agency obligations. These exceptions are set forth in 12 U.S.C. § 24 Seventh. The Comptroller's attempt, in September 1963, to extend national banks' authority to deal in revenue bonds not backed by the taxing power was held to violate the Glass-Steagall Act in *Baker, Watts & Co.* v. *Saxon*, 261 F. Supp. 247 (D.D.C. 1966), *aff'd sub nom. Port of New York Authority* v. *Baker, Watts & Co.*, 392 F.2d 497 (D.C. Cir. 1968).

[3] P.L. 87-722, 76 Stat. 668 (1962), 12 U.S.C. § 92a.

[4] Section 11(k) of the Federal Reserve Act of 1913, 38 Stat. 262 (1915), as amended by 40 Stat. 968 (1918) and 48 Stat. 2 (1933), formerly 12 U.S.C. § 248(d) (1958).

[5] 12 C.F.R. § 9, 28 Fed. Reg. 3309 (1963), as amended, 29 Fed. Reg. 1719 (1964), 33 Fed. Reg. 9649 (1968).

set forth conditions under which national banks might operate open-end investment funds.[6] The original Regulation did not require, however, that the moneys to be deposited in these funds were to be received by banks in trust. The Internal Revenue Service did not respond favorably to the Comptroller's request for a ruling that bank open-end investment funds would be entitled to the income tax exemption afforded common trust funds by *Internal Revenue Code of 1954* Section 584[7] until the Comptroller amended his Regulation[8] to require that sums placed in such investment

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[6] Comptroller Saxon also encouraged national banks to spread into other nonbanking activities, a number of which have since been declared unlawful. *See Baker, Watts & Co.* v. *Saxon,* note 2 *supra; Georgia Ass'n of Independent Ins. Agents, Inc.* v. *Saxon,* 268 F. Supp. 236 (N.D. Ga. 1967), *aff'd,* 399 F.2d 1010 (5th Cir. 1968). The Comptroller neither appealed the adverse District Court decision in the former case nor filed a petition for certiorari in the latter. Several other cases challenging the Comptroller's regulations are still in litigation. *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 406 F.2d 837 (8th Cir. 1969), *rev'd* (on the issue of standing), 397 U.S. 150 (1970); *Arnold Tours Inc.* v. *Camp,* 408 F.2d 1147 (1st Cir. 1969), judgment vacated and remanded for reconsideration in light of the Court's decision in the *Association of Data Processing Service Organizations* case, 397 U.S. 150 (1970); petitions for certiorari from decisions upholding standing to sue in *The Wingate Corp.* v. *Industrial National Bank,* 408 F.2d 1147 (1st Cir. 1969) and *Camp* v. *The Wingate Corp., id.,* were denied, 90 S. Ct. 1110 (Mar. 23, 1970).

[7] Section 584 exempts those common trust funds maintained by a bank:

> "(1) exclusively for the collective investment and reinvestment of moneys contributed thereto by the bank in its capacity as a trustee, executor, administrator, or guardian; and
>
> "(2) in conformity with the rules and regulations, prevailing from time to time, of the Board of Governors of the Federal Reserve System or the Comptroller of the Currency pertaining to the collective investment of trust funds by national banks."

[8] 29 Fed. Reg. 1719 (1964).

funds must be received in trust. Rev. Rul. 64-59, 1964-1 (Pt. 1) CUM. BULL. 193.[9]

On May 10, 1965, the Comptroller granted respondent First National City Bank of New York ("Citibank") the first administrative approval of such a bank-sponsored investment fund, although Citibank's investment fund differed in many ways from the Comptroller's Regulation.[10] The Comptroller has announced that he will approve all other national bank funds in the form of Citibank's fund (A. 94).

One difference between Citibank's fund and the Comptroller's Regulation was that Citibank chose not to receive its customers' money in trust.[11] Its fund was therefore ineligible for the tax exemption provided common trust funds by *Internal Revenue Code of 1954* Section 584 under the aforementioned ruling. Citibank secured a tax-exempt status for the fund, however, by registering it with the Securities and Exchange Commission as an open-end investment company under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.*,[12] thereby making the fund eligible for the special tax treatment accorded to regulated investment companies by Sections 851 and 852 of the *Internal Revenue Code*. Citibank effected such registration on April 20, 1966, designating the bank as principal

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[9] *Hearings on H.R. 8499 and H.R. 9410 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 2d Sess. 49 (1964), hereinafter referred to as *"1964 Hearings"; Hearing on Common Trust Funds Before a Subcomm. of the House Comm. on Government Operations*, 88th Cong., 1st Sess. 58-59 (1963), hereinafter referred to as *"1963 Hearing."*

[10] See note 51 *infra*.

[11] *Hearings on S. 2704 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 89th Cong., 2d Sess. 582 (1966), hereinafter referred to as *"1966 Hearings."* See also Wall St. J., Feb. 26, 1964, at 1, col. 5.

[12] Hereinafter referred to as the "Investment Company Act."

underwriter and also as investment advisor. Citibank also filed a registration statement with the Commission, pursuant to the Securities Act of 1933, 15 U.S.C. §§ 77(a) *et seq.*,[13] registering the fund's "units of participation" (A. 148) as securities to be issued by the fund (A. 208).

The bank also sought from the Commission certain exemptions from provisions of the Investment Company Act. The Commission approved these exemptions, expressing no opinion concerning the effect of the Glass-Steagall Act.[14] The Commission's approval was premised on its view that the fund was an entity separate and distinct from Citibank itself.[15] The Federal Reserve, on the other hand, found that the fund was not an entity separate and distinct from the bank, and on that basis held that there was no violation of Section 32 of the Glass-Steagall Act (see p. 29 *infra*) because there could be no interlocking relationship between the bank and a separate entity engaged in the securities business. 12 C.F.R. § 218.111 (1965). In that same proceeding, the Federal Reserve indicated its view that the fund's "units of participation" are securities within the meaning of the Glass-Steagall Act.[16] That finding necessarily raised issues of the fund's lawfulness under Section 21 of the Act. As the Federal Reserve pointed out:

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[13] Hereinafter referred to as the "Securities Act."

[14] SEC Investment Co. Act Release No. 4538 (Mar. 9, 1966), reproduced in *1966 Hearings*, *supra* note 11, at 81. The Commission's approval was challenged by the National Association of Securities Dealers. That case was consolidated with this one in the Court of Appeals and is here on certiorari (No. 835) from the Court's affirmance of the Commission's decision.

[15] Chairman (then Commissioner) Hamer H. Budge, dissenting, asserted that "the 'single entity' interpretation is a realistic appraisal of the true nature of the Bank's proposed operation." *Id.* at 88-89.

[16] *Id.* at 583.

> "In conclusion, the Board called attention to section 21 of the Banking Act of 1933 which, briefly, forbids a securities firm or organization to engage in the business of receiving deposits, subject to certain exceptions. However, since section 21 is a criminal statute, the Board has followed the policy of not expressing views as to its meaning. (1934 Federal Reserve Bulletin 41,543) The Board, therefore, expressed no position with respect to whether the section might be held applicable to the establishment and operation of the proposed 'Commingled Investment Account'." 12 C.F.R. § 218.111 (1965).

The Comptroller disputed the Federal Reserve's view that the fund's units of participation are securities under the Glass-Steagall Act, but sided with the Federal Reserve rather than with the Securities and Exchange Commission in viewing the fund and the bank as a single entity.[17]

The regulatory agencies involved are thus in disarray over features of the fund upon which its lawfulness under the Glass-Steagall Act depends.

Several other major banks planning to sponsor investment funds have applied to the Securities and Exchange Commission for similar exemptions from provisions of the Investment Company Act. See note 53 *infra*.[18] As of this date, however, Citibank has the only such bank investment fund in operation.

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[17] See testimony of former Comptroller Saxon. *1963 Hearing, supra* note 9, at 37, 54.

[18] The Commission has advised this Court that there "is no assurance that the Commission would reach the same judgment [as in the Citibank case] if a similar matter is again presented." Memorandum for the Securities and Exchange Commission, *National Ass'n of Securities Dealers* v. *SEC*, U.S. Sup. Ct. No. 835, October Term, 1969, p. 4.

In April 1966, Petitioners (who are described at p. 13 *infra*) brought this suit against the Comptroller, charging that Regulation 9, as implemented by approval of Citibank's fund, permitted bank activity which violates the Glass-Steagall Act. On cross motions for summary judgment, the District Court (McGarraghy, J.) declared that Regulation 9, as implemented, was unlawful (A. 256-57). The Comptroller was enjoined from authorizing additional national banks to operate such funds (A. 257), but the order requiring dissolution of Citibank's fund was stayed pending appeals filed by the Comptroller and by Citibank (A. 257) which had by then intervened (A. 258). The Court of Appeals (Bazelon, C.J., Miller and Burger, JJ.) reversed. On November 18, 1969, the judgment of the Court of Appeals was stayed by Mr. Justice Black pending resolution of these issues on certiorari.[19]

The Parties and Industries Involved

A. The Mutual Fund Business

Mutual funds came into existence in the 1920's[20] and have operated completely apart from the banking industry since passage of the Glass-Steagall Act. See p. 29 *infra*.

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[19] Citibank's November 24, 1969 Prospectus for the Fund (Attachment B, p. 12, to Form N-IR filed with SEC December 29, 1969) states:

> "A final decision adverse to either agency might require the termination of the Commingled Account and the distribution of its net assets to the Participants or the resignation of the members of the Committee who are affiliated with the Bank and the termination by the Bank of the management agreement. The Bank is of the opinion, however, that the nature of the Commingled Account's portfolio is such that the securities could readily be sold to facilitate a cash distribution without materially affecting the then net asset value per unit."

[20] *1966 Hearings, supra* note 11, at 65. See also *id.* at 97-98.

A mutual fund issues and sells securities which represent undivided interests in its investment portfolio. The proceeds are invested in accordance with each fund's stated investment policy (A. 209). Each fund is continuously changing the make-up of its portfolio and is thus continuously buying and selling securities in the market.

Mutual funds take both corporate and non-corporate forms. Securities of the latter are designated as "beneficial interests," "participating agreements," and the like (A. 209).

There is no significant trading market for mutual fund shares (A. 209). Rather, an investor desiring to dispose of his shares may at any time require the fund to redeem his proportionate share of the fund's current net asset value. This "open-end" feature distinguishes mutual funds (referred to as open-end investment companies) from the closed-end investment company, in which no right of redemption exists. A mutual fund continuously issues its securities for sale to generate the cash needed to meet these redemption obligations; otherwise, portions of the fund's portfolio might have to be liquidated. See pp. 25-26 *infra*.

To facilitate this redemption process and to establish a price at which new sales are offered, the value of a share in a mutual fund is calculated at least once a day on the basis of the market value of the securities held by the fund (A. 209). See also SEC Investment Company Act Rule 22c-1, 17 C.F.R. § 270.22c-1 (1968).

The Board of Directors of a mutual fund, elected annually by the fund's investors, governs the fund's activities. Mutual funds enter into contracts with investment advisors who furnish supervisory and administrative

services as well as advice concerning investment portfolios. The advisor's compensation is usually an annual fee based upon the total value of the assets being managed (A. 210). The traditional fee has been one-half of 1 percent, or less in the case of many funds.[21] Mutual funds also contract with a principal underwriter for the distribution of the fund's securities (A. 210). Those mutual funds which do not charge a sales commission (or sales "load") as part of the price for their securities are known as "no-load" funds (A. 210).

Mutual funds are regulated by the Securities and Exchange Commission under the Investment Company Act.[22] Under the provisions of that Act, a mutual fund is registered as open-end investment company (A. 210-11). In addition, the shares issued by the fund representing the investors' units of participation in the fund, are registered as securities with the Commission pursuant to the Securities Act. These securities are offered to the investing public by means of a prospectus, which is also filed with and subject to regulation by the Commission (A. 211).

B. The Investment Company Institute

Petitioner Investment Company Institute[23] is an association which at the time of the proceedings below represented 177 mutual funds, their 88 investment advisors and

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[21] *Report of the SEC on the Public Policy Implications of Investment Company Growth*, HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, H.R. REP. No. 2337, 89th Cong., 2d Sess. 89 (1966).

[22] *Id.* at 59-71 summarizes the basic regulatory pattern.

[23] Individual Petitioners, also members of the Institute, include Investors Diversified Services, Inc.; Investors Management Company, Inc.; Hugh W. Long & Company, Inc.; Wellington Management Company; and Wellington Company, Inc. (A. 7-9).

78 principal underwriters (A. 206). These members, which included both "load" and "no-load" funds, represent about 94 percent of all such companies in the United States and had approximately 3.5 million shareholders and assets of more than $36 billion (A. 206).

C. Commercial Banking

Commercial banks conduct the "business of banking" described in Section 16 of the Glass-Steagall Act, 12 U.S.C. § 24 Seventh—"by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this chapter . . . ." See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 326-30 (1963).

As of June 30, 1969, there were 13,464 commercial banks, of which 4,700 were national banks under the supervision of the Comptroller (12 U.S.C. § 21 *et seq.*); 1,236 were state member banks of the Federal Reserve System (national banks are also required to be members under 12 U.S.C. § 222); and 7,528 were state nonmember banks with deposits insured by, and therefore subject to supervision of, the Federal Deposit Insurance Corporation under 12 U.S.C. § 1815. FED. RES. BULL., Mar. 1970, at A. 21.

D. First National City Bank

As of June 1969, respondent Citibank was the nation's third largest commercial bank (after Bank of America and Chase-Manhattan). It had as of that date total assets of $21.2 billion and deposits of $17.4 billion. POLK'S WORLD BANK DIRECTORY vi (150th ed. 1969). In 1967, Citibank had

168 branches in metropolitan New York and 241 overseas offices.[24]

The Citibank Investment Fund

The purpose and structure of Citibank's open-end investment fund are the same as those of mutual funds. Citibank uses the pooled funds tendered to it by its investors to invest in securities in accordance with the fund's stated investment policy (A. 212). Any individual may become a participant in Citibank's fund by tendering $10,000 or more to the bank under a short form which accompanies sales literature sent to bank customers (A. 158). The form designates the bank as managing agent. The promotional literature is accompanied by a copy of the prospectus for the fund (A. 170) in which Citibank describes the "opportunity for long-term growth of principal and of income" by investing in the bank's fund.

A "unit of participation" is issued to the investor which represents his share of the fund's assets. An investor may at any time require the bank to redeem his units of participation for the proportionate share of the fund's net asset value which those units represent.[25]

To facilitate the redemption process, the value of the fund's portfolio is determined not less frequently than once a week and daily valuations are made, if necessary, to cover redemptions (A. 149, 150). Cf. SEC Investment Company Act Rule 22c-1, 17 C.F.R. § 270.22c-1 (1968).

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[24] Citibank's 1967 Annual Report, pp. 16, 19, filed with the Comptroller of Currency.

[25] During the fiscal year ended August 31, 1969, Citibank redeemed over 168,000 units for $2.1 million. Annual Report of Management Investment Company of the Commingled Investment Account of First National City Bank for fiscal year ended August 31, 1969 (Form N-IR, at 3, filed with the SEC December 29, 1969).

Operation of the fund is supervised by a Committee of five persons, who occupy "a position equivalent to that occupied by the board of directors of a mutual fund" (A. 214). Pursuant to an annual investment advisory contract with the Committee, the bank provides investment services, for which it is paid a fee of one-half of 1 percent of the portfolio's net asset value. *Id.*

The bank acts as underwriter of the units of participation pursuant to a contract executed between the fund and the bank. *Id.* Sales of the units are handled by employees and officers of the bank; they are made without commission on sales, as in the case of a "no load" mutual fund.

The June 1966 prospectus for the bank's investment fund stated that the fund's investment policy "is to invest in securities which offer the opportunity for long-term growth of capital and of income . . . principally in common stocks and in securities convertible into common stocks . . ." (A. 147). The bank's six-month report to participants in the fund dated April 1967 stated that "we have invested your funds in ~~four~~ ten major industries with emphasis in the office equipment, electrical and electronics, drug and cosmetic, and airline groups" (A. 180). The bank compares the performance of its fund with the Dow-Jones Industrial Average, a method of dramatizing investment results frequently used by mutual funds (A. 180).

The Decision Below

In reversing the District Court's holding that the Citibank fund was in all substantial respects a mutual fund which a bank could not lawfully operate, the Court of Appeals issued three opinions: a per curiam opinion; an opinion of Chief Justice (then Judge) Burger, in which

Judge Miller concurred; and an opinion by Chief Judge Bazelon.

The only reference to the merits of this case in the per curiam opinion was a conclusion that the action taken by the Comptroller was "fully consonant" with the statute committed to his regulatory jurisdiction (A. 266). The court also stated that the "opinion of Judge Burger, in which Judge Miller concurs, and the opinion of Chief Judge Bazelon . . . set forth the reasons for our action . . . " (A. 266).

The opinion of the two-judge majority was devoted principally to the standing issue. It dealt briefly with the merits, treating the case as a matter of judicial review of agency expertise in defining the scope of statutory authority granted the agency and the banks by Congress (A. 309-10).

The opinion of Chief Judge Bazelon also concluded that the Comptroller's approval of Citibank's fund under Regulation 9 was lawful. Judge Bazelon found that Citibank's fund "is the functional equivalent of an open-end mutual fund" (A. 269), but noted certain differences. See p. 41 *infra*.

Judge Bazelon dealt first with the issue whether 12 U.S.C. § 92a authorized "the commingling of managing agency accounts" since that "represents a departure from past banking practice of limiting commingling to funds held by the bank in the traditional trust capacities and as trustee of a pension or profit-sharing trust." He noted that the Comptroller's Regulation "permits banks to serve multiple principals under a standard agreement vesting the bank with broad discretion to invest their money, subject to the duties and liabilities of a managing agent, and

not a trustee" and that this is "a new and free-wheeling form of fiduciary activity" (A. 271-72). He nonetheless found that the Regulation was consistent with Section 92a because "the Comptroller's Regulations, together with the protection of the customer *qua* investor afforded by the securities acts, will reasonably assure the proper exercise of this broad fiduciary power" (A. 272).

Turning next to the question of whether the fund authorized by the Comptroller violated the provisions of the Glass-Steagall Act, Judge Bazelon determined that the definitions of "security" and "underwriter" in that Act must be limited to situations in which banks risked their assets in speculative securities and "entered the business of investment banking by underwriting original issues" (A. 274). He therefore found that Sections 16, 20, 21 and 32 of the Act were inapplicable to Citibank's fund.

In summarizing his conclusions Judge Bazelon stated that:

> "The essential element in this judgment on the applicability of the Glass-Steagall Act is the fact that the securities in the Account are bought and sold for the account of customers" (A. 278).

Accordingly, he found that the Glass-Steagall Act was powerless to cope with the fact that

> " . . . an increase in [the banks'] already massive securities holdings for the account of customers has some disquieting consequences for the underpinnings of corporate accountability and competition in the economy at large . . . " (A. 278) (footnote omitted).

SUMMARY OF ARGUMENT

I

A. Citibank's open-end investment fund, which is registered as an investment company under the Investment Company Act, involves the issuance, sale, distribution and underwriting of securities, just as in the case of any other open-end investment company. Sections 16, 20, 21, and 32 of the Glass-Steagall Act prohibit banks from engaging in such securities activities. Section 21 forbids joint operation of a securities and banking business. Section 16 forbids a bank from dealing in securities except upon the order and for the account of customers. Sections 20 and 32 forbid affiliations and interlocking relationships between banks and firms engaged in securities activities. The undivided interests in an open-end investment fund regardless of how denominated are securities within the meaning of the Glass-Steagall Act. The Federal Reserve has so held in the case of Citibank's fund, just as it has held that shares of other open-end investment companies are securities within the meaning of the Glass-Steagall Act. The Federal Reserve has also ruled that, because of the redemption process, the issuance of securities constitutes a primary activity of open-end investment funds. On that basis, the Federal Reserve has consistently prohibited bank directors from serving as mutual fund directors under Section 32 of the Glass-Steagall Act. Whether or not a bank open-end investment fund is an entity separate and distinct from the bank, the fund violates one or more of Sections 16, 20, 21, and 32. The comptroller therefore has no power to authorize bank operation of open-end investment funds.

B. The legislative history of the Glass-Steagall Act shows that there had been a number of abuses inherent in

the joint operation of a banking and securities business, some of which are directly pertinent to Citibank's operation of an investment fund: (1) the bank stands to profit from the invocation of its ostensibly disinterested investment advice; (2) the relationship between the fund and the bank is in significant respects similar to that between securities affiliates and banks in the 1920's; and (3) there are potential conflicts of interest between the bank's securities and lending functions. There are other potential conflicts of interest which inhere in Citibank's operation of the investment fund—Citibank's ability to affect the value of its portfolio by precipitating a change in the prime rate of interest; Citibank's use of its portfolio transactions to secure deposit accounts of brokers; and, finally, the danger to the public interest inherent in permitting banks to gain control over still more quantities of voting securities.

C. The differences noted by the court below between Citibank's investment fund and other mutual funds are not significant. Limitations on publicizing the fund through Citibank's trust department are not meaningful in view of the size of that institution and the scope of its contacts with the public. There is no difference between the fees charged by Citibank for its investment advisory service and the traditional level of charges in the mutual fund industry. Finally, the Comptroller's regulation subjecting trust department investments to regulation by the Comptroller under "sound fiduciary principles" is irrelevant since Citibank's fund portfolio must under the Investment Company Act conform to the investment policy stated in the fund's prospectus. Positions taken by leading representatives of the banking and securities industries confirm that the Citibank fund is in all important respects identical to a mutual fund.

II

A. The "fiduciary" label affixed to Citibank's fund by Citibank and the Comptroller does not suffice to exempt it from the Glass-Steagall Act. That Act was designed to prohibit banks from abusing their fiduciary obligations.

B. 12 U.S.C. § 92a neither authorizes the operation of an open-end investment fund like the Citibank fund nor does it immunize such a fund from the Glass-Steagall Act. The obligations of other mutual funds are no less "fiduciary" than those of bank-operated funds. The Federal Reserve had refused to permit banks to operate common trust funds except as incident to bona fide or strictly fiduciary relationships and had viewed the use of such funds solely for investment purposes as not being for a bona fide fiduciary purpose. Citibank's open-end investment fund provides for automatic commingling of customers' investment sums secured on a package basis, requires no personal relationships and is otherwise devoid of the trust concepts which inhere in Section 92a.

ARGUMENT

I. THE BANK INVESTMENT FUND AUTHORIZED BY THE COMPTROLLER VIOLATES THE GLASS-STEAGALL ACT.

The Glass-Steagall Act was enacted in a period of national financial crisis. Events which had their roots in the 1929 crash caused a wave of bank failures leading up to the Bank Holiday of 1933.[26] The latter occurred in the midst of a Congressional inquiry into the role of the commercial banking industry in the collapse of the securities market and the ensuing depression.[27]

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[26] See 1933 COMPTROLLER OF THE CURRENCY ANN. REP. 1.

[27] The present dispute over the first attempted entry of a bank into the open-end investment fund business is an echo from the

Congress in 1933 determined to separate the banking and securities industries as a "preventive or prophylactic measure." *Board of Governors* v. *Agnew*, 329 U.S. 441, 449 (1947). Sections 16, 20, 21 and 32 of the Glass-Steagall Act were fashioned to achieve that result.

It has been understood for over 30 years that the Glass-Steagall Act forbids joint operation of a securities and banking business.[28] No one doubts that an open-end investment fund is engaged in the securities business; the Glass-Steagall Act has repeatedly been applied to mutual funds. See pp. 25-27, 29-30 *infra*.

Against these facts and the language of Sections 16, 20, 21, and 32 of the Act, the result reached below is remark-

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past. A primary focus of Congress' hearings in the early 1930's was on the ventures of respondent (then National City Bank of New York) into the securities business. See *e.g.*, 75 CONG. REC. 9909 (1932). See also F. PECORA, WALL STREET UNDER OATH 76 (1939, reprinted 1968):

> "The National City alone, under Mr. Mitchell's pioneering direction, came to sell not less than $1,000,000,000 of securities per year, and sometimes $2,000,000,000—aggregating the enormous total of at least $20,000,000,000 in securities which the National City manufactured, or in the manufacture of which it participated, for the ten years preceding the Senate investigation. And the National City not only 'manufactured' (the phrase is Mr. Mitchell's) these huge quantities of securities, 'suitable for public distribution'—it likewise sold these securities like so many pounds of coffee to the public. (This analogy likewise of Mr. Mitchell's.)"

[28] The prohibitions of the Glass-Steagall Act were understood at the time of the Act's passage to bar relationships between a bank and an investment fund of the type authorized by the Comptroller's Regulation. The corporate predecessor of one of the petitioners, Investors Management Company Inc., was a subsidiary of the Irving Trust Company of New York and was also an investment advisor to Irving Investors Fund C, Inc., an open-end investment fund whose shares were sold to customers of Irving Trust. The Irving Trust Company in 1934 divested itself of Irving Investors Management Company because of the passage of the Glass-Steagall Act (A. 38-40).

able: A fund which operates just like a mutual fund, which registers as an open-end investment company with the Securities and Exchange Commission under the Investment Company Act, which thereby secures the special tax benefits provided by that status, and which registers the shares it issues under the Securities Act—is somehow permitted to deny that it is engaged in the securities business under the Glass-Steagall Act. Nothing in that Act or its legislative history warrants such a strained construction of its terms.

A. Citibank Through Its Open-End Investment Fund Issues, Sells and Underwrites Securities Within the Meaning of the Glass-Steagall Act

Section 16 (together with Section 5(c), 12 U.S.C. § 335—see note 29 *infra*), provides that a member bank's authority to engage in the "business of dealing in securities and stock . . . shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account" and that the bank "shall not underwrite any issue of securities or stock . . . ."

Sections 20 and 32 apply when the securities activity is conducted by an entity separate from the bank. Section 20 prohibits affiliations between member banks and entities "engaged principally in the issue, flotation, underwriting, public sale, or distribution . . . of stocks, bonds, debentures, notes, or other securities . . . ." Section 32 prohibits officers, directors, or employees of member banks from holding like positions at the same time in enterprises primarily engaged in the issue, flotation, underwriting, public sale, or distribution of stock, bonds, or similar securities.

The most sweeping of the four provisions, however, is Section 21, which prohibits any business organization from

engaging simultaneously in commercial banking and "the business of issuing, underwriting, selling, or distributing, . . . stocks, bonds, debentures, notes, or other securities."[29]

Citibank's activities in creating, controlling and promoting its investment fund and in selling and distributing its "units of participation" to investors in the fund constitute securities activities which are barred by one or more of the foregoing provisions of the Glass-Steagall Act.

1. The central point with respect to the applicability of all these sections is that the undivided interests in an open-end investment fund—whether they are called "shares," or "units of participation," or "beneficial interests"—are securities within the meaning of the Glass-Steagall Act.

While the decision below is based on deference to agency expertise, the critical holding that the "units of participation" of Citibank's investment fund are not securities within the meaning of the Glass-Steagall Act contradicts the judgment of the Federal Reserve, the agency

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[29] Judge Bazelon incorrectly thought Section 21 lacked independent significance. In his view, its sole purpose was "to extend the prohibitions of § 16 to members of the Federal Reserve System who were not national banks" [*i.e.*, State member banks]. (A. 276). The extension of the Section 16 prohibitions to State member banks, however, was explicitly accomplished by Section 5(c) of the Act:

> "State member banks shall be subject to the same limitations and conditions with respect to the purchasing, selling, underwriting and holding of investment securities and stock as are applicable in the case of national banks under [Section 16]."

The same court had previously emphasized the independent significance of Section 21 in describing its prohibitions:

> "When Congress meant complete separation it said so, in this [Section of the] Act, in unmistakable terms. It knew what terms to use, and used them." *Agnew* v. *Board of Governors*, 153 F.2d 785, 793 (D.C. Cir. 1946), *rev'd on other grounds*, 329 U.S. 441 (1947).

charged with administering the Glass-Steagall Act since 1933. It is the Federal Reserve's view that Citibank's units of participation are securities within the meaning of the Glass-Steagall Act. *1966 Hearings, supra* note 11 at 584. Indeed, the Federal Reserve has "consistently taken the position that participations or shares in an ordinary open-end investment company or mutual fund are 'securities' for the purposes of Section 32." *Id.* at 583. The Board said that the Glass-Steagall Act is:

> ". . . sufficiently broad to comprehend securities which, while neither stocks or bonds, have attributes which cause them to be 'similar' to, or somewhat like, either bonds or stocks." *Id.* at 584.

Furthermore, while the term "securities" is not defined in the Glass-Steagall Act, the sections of the Act which refer to that term do so in a context which suggests that it should not be narrowly construed. The language of Sections 20 and 21—"stocks, bonds, debentures, notes, or other securities"—does not reflect a restrictive intent. Finally, Citibank's units are investment media and represent undivided interests in the fund's assets just as in the case of shares of garden-variety mutual funds. Citibank's units of participation are securities within any reasonable construction of that term in the Glass-Steagall Act. It therefore does not matter whether Congress can be thought to have intended the term security in the Glass-Steagall Act to have a different meaning than the same term in the simultaneously-enacted Securities Act of 1933.

2. Like considerations require construing the terms of the Glass-Steagall Act describing prohibited securities activities in accordance with their natural meaning. Thus, the prohibitions of the Act apply to mutual funds because, as the Federal Reserve has ruled, the business of issuing securities within the meaning of the Act constitutes a primary activity of such a fund:

> "It is customary for [mutual funds] to have but one class of securities, namely, capital stock, and it is apparent that the more or less continued process of redemption of the stock issued by such a company would restrict and contract its activities if it did not continue to issue its stock. Thus, the issuance and sale of its stock is essential to the maintenance of the company's size and to the continuance of operations without substantial contraction, and therefore the issue and sale of its stock constitutes one of the primary activities of such a company." 12 C.F.R. § 218.101 (1951).[30]

The redemption process likewise requires Citibank continuously to issue shares in its open-end investment fund. See note 25 *supra* and p. 35 *infra*. Citibank is therefore engaged in the issuance of securities within the meaning of Section 21 of the Act. Since that section prohibits banks from engaging in the business of issuing securities, the Comptroller has no power to authorize a bank to operate an open-end investment fund.

Citibank's investment fund also violates those provisions of Section 21 which prohibit commercial banks from selling, distributing, or underwriting securities. The prospectus for the fund (A. 146) and Citibank's sales circular (A. 170) show that the bank is selling, distributing, and underwriting[31] shares in its fund within any reasonable definition of those terms.[32]

Contrary to the views expressed by Judge Bazelon, the fact that the bank does not secure a specific distribution

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[30] Accord, 27 FED. RES. BULL. 399 (1941); 12 C.F.R. § 218.102 (1960); 12 C.F.R. § 218.107(e) (1963).

[31] Citibank is the fund's statutory underwriter (A. 142-44).

[32] Former SEC Chairman Manuel F. Cohen stated:

> "A commingled managing agency fund will operate essentially as follows: The banks will sell to their customers, and apparently to any other interested person, a participation in a pool of general securities, usually equity securities, which

profit or sales commission from its sales and distribution activity in behalf of the fund has no bearing upon the question whether the bank is engaged in underwriting, selling, distributing or dealing in securities within the meaning of the Glass-Steagall Act. The bank profits from promoting sales of units in the fund because its income is based on the size of the fund (see p. 16 *supra*). The Federal Reserve has held that a mutual fund is engaged in the public sale and distribution of its securities within the meaning of the Glass-Steagall Act irrespective of the fact that "the investment company does not derive any direct profit from the sales" of these shares. 12 C.F.R. § 218.101 (1951). Furthermore, as previously noted, the investment advisory fee is the only fee charged by "no-load" mutual funds, which no one doubts involve underwriting, selling, distributing and dealing in securities. The Senate and House Committees on Banking and Currency are also of the view that a bank open-end investment fund like that of Citibank's is engaged in the "underwriting, distribution and sales of securities" for the purposes of the banking and securities laws. S. Rep. No. 91-184, 91st Cong., 1st Sess. 10, 25 (1969); H. Rep. No. 91-387, 91st Cong., 1st Sess. 3, 9, 24 (1969); 115 Cong. Rec. H10553, H10554 (Daily ed. Nov. 5, 1969).

3. Comptroller Saxon had no power to promulgate Regulation 9 or to approve Citibank's fund because Sec-

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are selected by the bank, but which do not represent an interest in or an obligation of the bank. Such participations will be sold simply upon the basis that they represent a desirable investment since the purchaser will obtain the benefits of the investment management services of the bank, which will endeavor to procure for the purchaser both capital appreciation and income through the judicious selection of securities in which funds contributed to the account will be invested.

"It seems perfectly clear that such a participation is essentially a security, a medium of investment, and it will be sold as such." *1966 Hearings, supra* note 11, at 133.

tion 16 precludes member banks from operating open-end investment funds. That section provides that a bank "shall not underwrite any issue of securities or stock," and that any "dealing in securities and stock [by the bank] shall be limited to purchasing and selling such securities and stock, without recourse, solely upon the order, and for the account of, customers . . . ." As shown by the contemporaneous construction of this Section, it was designed to permit national banks to effect securities transactions as an accommodation to customers located in communities removed from the money centers. 1933 COMPTROLLER OF THE CURRENCY ANN. REP. 11. The Comptroller ruled in 1936 that a bank's authority under this section was limited to executing a customer's instructions:

> "In general [the statutory provision] confines the activity of a national bank in purchasing and selling securities for the accounts of customers to that of an accommodation agent, the purpose being to prevent such banks from engaging in the business of dealing in securities for profit, without limiting the service which may be rendered to customers in purchasing and selling securities upon their orders and for their accounts." Bulletin of Comptroller of the Currency, Oct. 27, 1936, quoted in 1 PATON'S BANK DIGEST 598 (American Bankers Ass'n ed. 1940).

Section 16 does not authorize a bank to create and promote an investment device and to solicit participants in the bank's open-end investment fund. The Comptroller ruled that the authority to effect a securities transaction "for the account of" a customer is limited to accommodating an existing customer and has emphasized that the customer relationship must exist independently of the particular securities transaction:

> "[The statutory provision] is to be construed as limiting the purchase and sale transactions mentioned to actual customers of the bank, which customer rela-

tionship exists independently and apart from the particular transaction in which the bank buys or sells upon the order and for the account of such 'customer,' in distinction to the relationship arising solely by virtue of the particular transaction." *Id.*

The Comptroller's office adhered to these interpretations through at least 1960. See Digest of Opinions of Comptroller of the Currency, par. 220 (April 1, 1960), 4 CCH FED. BANKING LAW ¶ 59,654.[33]

4. An affiliation or interlocking relationship between an open-end investment fund and a member bank might violate Sections 20 and 32 of the Act. If the fund and the bank are separate entities, bank officials may not serve on the fund's board of directors. The Federal Reserve has said that "ordinary open-end investment companies or mutual funds have been regarded by the Board as subject to section 32. Accordingly, the Board consistently has taken the view that interlocking relationships described in the statute between such funds and member banks are prohibited . . . ." *1966 Hearings, supra* note 11, at 585.[34]

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[33] Bank officials have recognized the limited authority of Section 16. The executive vice president of the Bank of New York said in 1962:

"Obviously, there is no problem [under Section 16] when banks act for a particular customer who owns individual securities. Orders are carried out upon the direction of the customer, and it makes no difference whether or not the motivation for the change resulted from a recommendation by the bank as investment adviser. But as soon as there is commingling, the customer no longer owns individual bonds or shares of stock but instead units in a commingled fund which the bank would manage. Any action taken would be solely by the bank for the account of the bank's investment fund and therefore only indirectly for any particular customer. Accordingly, the bank would be acting contrary to section 16 and the other pertinent provisions of the Banking Act of 1933 in operating a fund made up of participations from accounts of individuals." *1963 Hearing, supra* note 9, at 123.

[34] In 1951, for example, the Board held:

". . . it is the opinion of the Board that if such [an open-end investment] company is issuing or offering its redeem-

Thus, whatever resolution is made of the dispute between the regulatory agencies below over whether Citibank's fund is an entity separate from the bank (see pp. 9-10 *supra*), one or more of Sections 16, 20, 21 and 32 bar bank operation of open-end investment funds.

5. On the understanding that total severance was required by the 1933 Act,[35] the banking and securities industries have developed separately. Moreover, the application of the Act over the years has played a significant role in shaping the structure and competitive standing of mutual funds in the investment media market. As noted (p. 29 *supra*), mutual funds have been denied the services of all executives of commerce and industry who also served on the boards or as officers of member banks.

Congress has repeatedly had the question of the propriety of bank entry into the mutual fund business under consideration, but has thus far not seen fit to permit it.[36]

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able stock for sale, it is 'primarily engaged in the issue . . . public sale, or distribution, . . . of securities' and that section 32 of the Banking Act of 1933, as amended, prohibits an officer, director or employee of any such company from serving at the same time as an officer, director or employee of any member bank." 12 C.F.R. § 218.101 (1951). See also 27 FED. RES. BULL. 399 (1941); 12 C.F.R. § 218.107 (1963).

[35] See the contemporaneous interpretations of the Act by the Comptroller (pp. 28-29 *supra*) and by a member of the mutual fund industry (note 28 *supra*), the 1941 ruling of the Federal Reserve (note 30 *supra*). See also discussion pp. 31-32, 39-40 *infra*.

[36] Currently, Congress is considering two bills affecting bank entry into the mutual fund business. One bill, expressly authorizing bank operation of open-end investment funds, passed the Senate (S. 2224, 91st Cong., 1st Sess.; 115 CONG. REC. 13700 (May 26, 1969)); but such authorization has been stricken by the appropriate House Committee (H.R. 17333, 91st Cong., 2d Sess.; see 17 Washington Financial Report A-9 (1970)). A second bill prohibits bank holding companies and their bank and non-bank subsidiaries from selling participations in commingled agency accounts (H.R. 6778, 91st Cong., 1st Sess.; 115 Cong. Rec. H10554, H10559 (Daily ed. Nov. 5, 1969)). Previous Congressional consideration of

Under the circumstances, the long-standing separation of these two industries based on the interpretations of the Glass-Steagall Act by the Comptroller and the Federal Reserve should not now be altered except by legislation. This Court stated in parallel circumstances that "Congress is the proper agency to change an interpretation of the Act unbroken since its passage, if the change is to be made." *Blau* v. *Lehman*, 368 U.S. 403, 413 (1962). See also *Toolson* v. *New York Yankees*, 346 U.S. 356, 357 (1953); *Port of New York Authority* v. *Baker, Watts & Co.*, 392 F.2d 497, 502, 504 (D.C. Cir. 1968).

B. Congress Meant to Separate the Banking and Securities Industries

The Court below refused to give effect to the terms of Sections 16, 20, 21 and 32. Judge Bazelon found the Act inapplicable because its purpose, he said, was "to protect bank depositors and the banking system from the risk of insolvency incident to widespread investment of banks' assets in speculative securities during the twenties" (A. 274). Even if it is appropriate at this late date to go behind the plain words of the Act,[37] the legislative history shows that the assumptions made over the last 30 years were not incorrect and that Sections 16, 20, 21, and 32 mean what they say.

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bank entry into the mutual fund business is reflected in *Hearings on Bank and Insurance Company Collective Investment Funds and Accounts, Investment Company Act Amendment of 1967, H.R. 14742 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. (1968); *Hearings on Amendment No. 438 to S. 1659 Before the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. (1967); *1966 Hearings*, *supra* note 11; and *1964 Hearings*, *supra* note 9.

[37] *Osaka Shosen Kaisha Line* v. *United States*, 300 U.S. 98, 100-01 (1937); *Matson Navigation Co.* v. *United States*, 284 U.S. 352 (1932); *Georgia Ass'n of Independent Ins. Agents, Inc.* v. *Saxon*, 268 F. Supp. 236, 238 (N.D. Ga. 1967), *aff'd*, 399 F.2d 1010 (5th Cir. 1968).

While Congress in 1933 was certainly concerned over links between commercial and investment banking, in which banks risked their own funds in purchasing securities, that was by no means its only concern.[38] As the court in *Baker, Watts & Co.* v. *Saxon*, 261 F. Supp. 247, 249 (D.D.C. 1966), *aff'd sub nom. Port of New York Authority* v. *Baker, Watts & Co.*, 392 F.2d 497 (D.C. Cir. 1968), noted of the congressional investigation leading up to the passage of the Act:

> "Many other evils and abuses also arose. Congress definitely and unalterably determined to compel commercial banks to return and confine themselves to their classic time-honored functions: acceptance of deposits of money subject to withdrawal by check or other means; discount of commercial paper; and making loans."

Some of these other evils and abuses were: (1) that customers seeking disinterested investment advice from their

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[38] The Federal Reserve has over the years applied the prohibitions of the Glass-Steagall Act to bar interlocking relationships between commercial banks and a variety of organizations which were engaged in the issuance, sale, distribution or underwriting of securities in which the bank's own funds were not subject to risk:

(i) open-end investment companies, 12 C.F.R. § 218.101 (1951);

(ii) companies engaged in selling or underwriting mutual funds shares, 12 C.F.R. § 218.107(e) (1963);

(iii) investment advisers which control sales distribution subsidiaries, 12 C.F.R. § 218.107 (1963);

(iv) real estate investment companies frequently issuing a substantial amount of stock relative to their capital, 12 C.F.R. § 218.104(b) (1961);

(v) corporations in special circumstances in the process of organization and selling their own stock, 12 C.F.R. § 218.105 (1961); and

(vi) closed-end investment companies in process of organization when issuance of own stock is primary activity of company, 12 C.F.R. §§ 218.102 (1960), 218.104 (1961).

banks had been encouraged to buy securities from which the banks stood to gain; (2) that banks operated securities affiliates; (3) that there were conflicts of interest between the bank's securities and lending functions.

1. *Failure to Give Disinterested Investment Advice*

Congress was concerned over the fact that some bankers had breached their fiduciary obligations by suggesting to depositors who sought disinterested investment advice that they make purchases from which the banks stood to gain. See S. REP. No. 1455, 73d Cong., 2d Sess. 163 (1934).[39]

Senator Bulkley said in this connection:[40]

> "The banker ought to be regarded as the financial confidant and mentor of his depositors. This underlying relationship is a natural and desirable one with respect to all depositors, although the aspects of it and the

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[39] During the year in which the Glass-Steagall Act was passed, the Federal Reserve stated:

> "The Board believes that it was the intent of the Congress in enacting the provision regarding officers and directors of member banks to terminate relationships of certain kinds between member banks and dealers in securities, apparently because the Congress believed that such relationships might tend to influence the banks' credit and investment policies and their advice to their correspondent banks and other customers respecting investments in a manner which the Congress deemed to be incompatible with the public interest." 1934 FEDERAL RESERVE ANN. REP. 57.

The Congressional purpose of assuring disinterested investment advice is also reflected in the exemption added to Section 32 by the Banking Act of 1935, 49 Stat. 709 (1935), 12 U.S.C. § 78, as amended. Under that provision the Federal Reserve may grant exceptions to the Section 32 prohibitions on interlocking relationships by general regulation but only upon a showing that such exceptions will "not unduly influence . . . the advice [the bank] gives its customers regarding investments."

[40] Senator Glass asked Senator Bulkley, a member of the Committee on Banking and Currency, to explain to the Senate various portions of the Glass-Steagall Act, including those relevant here. 75 CONG. REC. 9909 (1932).

kind of advice called for will necessarily vary a great deal from the poor widow whose life savings are evidenced by a savings passbook to the great corporation requiring financial aid in the development of intricate business problems.

"Obviously, the banker who has nothing to sell to his depositors is much better qualified to advise disinterestedly and to regard diligently the safety of depositors than the banker who uses the list of depositors in his savings department to distribute circulars concerning the advantages of this, that, or the other investment on which the bank is to receive an originating profit or an underwriting profit or a distribution profit or a trading profit or any combination of such profits." 75 CONG. REC. 9912 (1932).

The sense of these remarks cannot be limited to the four types of profit which Senator Bulkley happened to mention. His concern was that a bank should profit at all by its sale of securities to a customer upon the customer's invocation of the bank's ostensibly disinterested investment advice.

Congress' aim to prevent banks from being able to sell securities to their customers from which the banks stood to profit has relevance here for three reasons: First, Citibank profits from the sale of a unit in the fund because its management fee is based on the size and value of the fund. See p. 16 *supra*. Second, the economics of operating an open-end fund like Citibank's are such that the fund must be aggressively merchandised to be viable. Former SEC Chairman William L. Cary testified before Congress:

"To make this activity economically practicable many accounts must be obtained. It is unrealistic to assume that the requisite number of accounts can be obtained without engaging in a public offering." *1963 Hearing, supra* note 9, at 8. See also *id.* at 19.

Third, the redemption process creates a pressure to sell new shares in the fund. The Affidavit of Citibank's Executive Vice President in support of its application to stay the District Court's order enjoining operation of the fund stated:

> "Even if the Commingled Account were to continue intact, without liquidation, the existing participants would be injured unless additional customers of the Bank were permitted to come in as participants. If new participants were not taken in from time to time, the Commingled Account would inevitably shrink in size as a result of withdrawals (including automatic withdrawals upon the death or incompetency of participants). As the net assets were reduced, the ratio of the operating expenses to net assets would increase" (A. 253).[41]

Indeed, the failure to replace withdrawals from the fund by selling additional shares may have a "snowballing" effect, in that each such withdrawal results in an increase of the ratio of expenses to net assets, thus adversely affecting performance, which in turn causes additional participants to withdraw. There is no equivalent set of pressures upon the bank to sell other trust department services to customers seeking disinterested investment advice. Thus, Judge Bazelon's observation that banks have equal incentive to sell other trust department services (A. 276) is incorrect. Furthermore, the situation which confronts a bank operating an investment fund when a customer seeks disinterested investment advice is in no way analogous to situations in which the family lawyer, the testator or a court asks the bank to serve as committee for an incompetent, or as guardian of a minor, or as executor, administrator, or trustee under a will.

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[41] The Affidavit also stated that the fund cost the bank $300,000 in organizational expenses (A. 251, par. 4).

2. *Securities Affiliates*

Another major area of concern was the operation by banks of securities affiliates.[42] Senator Glass stated:

> "But these affiliates, I repeat, were the most unscrupulous contributors, next to the debauch of the New York Stock Exchange, to the financial catastrophe which visited this country and was mainly responsible for the depression under which we have been suffering since. They ought to be separated, and they ought speedily to be separated, from the parent banks; and in this bill we have done that." 77 CONG. REC. 3726 (1933).

Some of these affiliates were engaged in "the operation of investment trusts which bought and sold securities purely for investment or speculative purposes" (A. 243). See *Hearings on S. Res. 71 Before a Subcomm. of the Senate Comm. on Banking and Currency,* 71st Cong., 3d Sess., pt. 7, at 1057 (1931). The District Court said, "These investment trusts were the equivalent of our present day investment companies" (A. 243).[43]

One of Congress' concerns over these affiliates was that they sometimes operated on funds borrowed from the parent or affiliate bank. S. REP. No. 77, 73d Cong., 1st Sess. 9 (1933). While Citibank's Prospectus announced that its fund will not borrow money (A. 148), the Comptroller's Regulation appears to permit banks to make loans to their

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[42] S. REP. No. 1455, 73d Cong., 2d Sess. 156-159 (1934); 75 CONG. REC. 9909-10 (1932). Congress did not restrict its concern to affiliates in which funds of the parent bank were risked. *Id.* at 9911.

[43] See also Galbraith, *1929 and 1969—Financial Genius Is A Short Memory and a Rising Market,* HARPER'S, Nov. 1969, at 56:

> "There was an explosion of these investment trusts in the late Twenties. If they sound suspiciously like a mutual fund, of which in these last years there has been an even more spectacular explosion, that suspicion is well founded."

investment funds, and to take back the fund's assets as security. 12 C.F.R. § 9.12(f) (1963).

Another of Congress' fears about securities affiliates was that, despite the absence of risk to the bank's funds, the public might identify the affiliate with the bank, with consequent adverse effects upon the bank in the event of a failure of the affiliate.[44] There is no reason to believe that Congress in 1933 would have had any less concern over the consequences of a failure of Citibank's fund.[45]

3. *Conflicts Between Interests of the Fund and Those of the Bank*

Congress feared that banks might allocate loan funds to companies whose securities they held (A. 274). The pressures which operate upon all mutual funds to sell new shares and avoid redemptions of outstanding shares (see pp. 26, 35 *supra*) create unique incentives on the part of banks to make loans needed by companies whose stock is held in their investment funds, in order to maintain the fund's value.

In the view of former SEC Chairman Cary, the possibility that "fund investments could be used to shore up

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[44] Senator Bulkley remarked as follows in connection with the possible consequences of the bank affiliate sustaining an underwriting loss:

> "And although such a loss would possibly not result in any substantial impairment of the resources of the banking institution owning that affiliate, still it might be suspected that large amounts might have been loaned to the affiliate; and whether that were true or not, there can be no doubt that the whole transaction tends to discredit the bank and impair the confidence of its depositors." 75 CONG. REC. 9912 (1932).

[45] The Federal Reserve reflected that concern in 1961 in observing that bank directors serving as directors of a real estate investment company ". . . might cause the company to be so identified in the minds of the public with the bank that any financial reverses suffered by the company might affect the confidence of the public in the bank." 12 C.F.R. § 218.104(c) (1961).

bank investments" represents an area "of potential conflict" between the fund's interests and those of the bank. *1963 Hearing, supra* note 9, at 11-12. A comparison of the list of Citibank's directors as of April 20, 1966 with the list of the fund's investments as of August 31, 1966 indicates that almost one-third of the fund's assets were invested in securities in companies whose officials were also directors of Citibank.[46]

The simultaneous engagement in the banking and open-end investment fund businesses creates other potential conflicts of interest which confirm the wisdom of a policy requiring their total separation. For example, Citibank is sufficiently powerful to precipitate (and thus have advance knowledge of) an increase or decrease in the prime rate of interest. Such a change in interest levels could have a dramatic impact upon the stock market generally and upon the value of securities held by the fund.

Again, banks can, by allocating brokerage payments, secure broker deposits, thus creating an incentive for turnover of the securities in the fund's portfolio. As former SEC Chairman Cary testified before Congress:

> "The fund has brokerage business to direct. We have learned that at present brokerage is often distributed by banks according to a formula which rewards those brokers who keep balances in the banks or have other business relations with the bank. This policy of the banks could lead to excessive portfolio turnover or to the fund not receiving the maximum benefit from its brokerage business." *1963 Hearing, supra* note 9, at 12.

Furthermore, the mutual fund market represents a potential for bringing under bank control substantial amounts

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[46] *Compare* A. 109-20 *with* A. 176-77.

of voting securities over and above the vast amounts now held in bank trust departments. Such acquisitions would increase the potential dangers in a situation which has already alarmed some thoughtful observers, including Judge Bazelon in the course of writing the opinion below (A. 278). See also STAFF OF SUBCOMM. ON DOMESTIC FINANCE, HOUSE COMM. ON BANKING AND CURRENCY, COMMERCIAL BANKS AND THEIR TRUST ACTIVITIES, 90th Cong., 2d Sess., vol. I, at 1-5, 18-30 (1968).[47] According to that report, Citibank's trust department, as of April 1, 1968, controlled approximately $6.4 billion in stocks. *Id.* at 49.

In any case, Congress was concerned not merely with the manifestations of the abuses revealed in the course of its investigations, but also with potential conflicts inherent in the joint operation of a banking and securities business. As Senator Bulkley explained prior to enactment of the Glass-Steagall Act:

> "It is not, of course, contended that the abuses here intimated are never avoided by the good conscience of the bankers. On the contrary, I believe they are avoided generally by good bankers. Certainly they are avoided much more often than they occur. Yet the

[47] In his letter transmitting that report, Congressman Wright Patman said that:

> "[I]t is my view that the data presented here for the first time show that the American economy of today is in the greatest danger of being dominated by a handful of corporations in a single industry as it has been since the great money trusts of the early 1900s. Through the various devices described in this study, commercial banks control the investments of billions of dollars of funds and vote large blocks of stock of major corporations in practically every important industry in the economy. These same banking institutions have gained representation on boards of directors of and serve as major sources of credit for many of these same major industrial corporations. Therefore, a few banking institutions are in a position to exercise significant influence, and perhaps even control, over some of the largest business enterprises in the nation." *Id.* at iii.

> danger is always there, and must be there as long as human nature remains human nature. . . . [W]e must surround the banking business with sound rules which recognize the imperfection of human nature [so] that our bankers may not be led into temptation, the evil effect of which is sometimes so subtle as not to be easily recognized by the most honorable man." 75 CONG. REC. 9912 (1932).

This Court characterized the Act as a "preventive or prophylactic measure. The fact that respondents have been scrupulous in their relationships to the bank is therefore immaterial." *Board of Governors* v. *Agnew*, 329 U.S. 441, 449 (1947). And, as the District Court held in this case, "this is effective legislation against temptation" (A. 245).

It is not of course incumbent on petitioners to show that the Citibank's venture into the securities business through its open-end investment fund recreates each and every abuse which led to the Glass-Steagall Act. The overall theme which emerges from the legislative history of that Act is Congress' conviction that the marriage of the banking and securities industries had led to many abuses and conflicts of interest, some of which had played important roles in causing a national disaster. It was not a time for nice distinctions between the various types of profit which banks derived from dealing in securities. Congress wanted the banks to have *no* profits from dealing in securities beyond the transactions in government bonds specifically permitted by Section 16. Congress decreed that the two industries were to be divorced. Sections 16, 20, 21 and 32 of the Act mean what they say.

C. There Are No Relevant Differences Between Citibank's Open-End Investment Fund and Other Mutual Funds

Finally, the differences which Judge Bazelon saw between Citibank's fund and any other open-end investment

fund furnish no basis for concluding that the Glass-Steagall Act applies to one but not the other. Judge Bazelon agreed with the Court's per curiam finding that the fund is "similar in most respects to an open-end mutual fund" (A. 265), but noted differences relating to (1) channels of distribution; (2) the amount of the bank's compensation; and (3) regulatory supervision by the Comptroller (A. 269-70). These alleged differences lack substance.

1. The fact that under Regulation 9 shares in a bank fund are offered and publicized only through the bank's trust department might be of some relevance to a fund sponsored by a small bank in an isolated community. The issue here, however, concerns the First National City Bank of New York, one of the world's largest financial institutions, with 168 branches in metropolitan New York, 241 overseas branches, and a staff of nearly 27,000. Citibank's 1967 Annual Report, pp. 16, 18, filed with the Comptroller of the Currency. By its own account, it serves "one out of every five families" in metropolitan New York. *1963 Hearing, supra* note 9, at 89. Its credit card customers alone number 1.4 million. Citibank's 1967 Annual Report, *supra*, p. 6. Given the size of this institution and the scope of its contacts with the public, there do not appear to be any meaningful limitations on its ability to publicize its fund.

Former SEC Chairman Cary pointed out in testimony before Congress:

> "It has been suggested that if the banks do not advertise the availability of participation in these commingled funds, no public offering will exist. However, advertising is not the only way to solicit participation.
>
> "The Bank of America with 738 branches and 25,700 employees in California, including branches in every community of modest size, can surely make the availability of the commingled managing agency account as

an investment medium known in a highly effective fashion." *1963 Hearing, supra* note 9, at 8.[48]

For the same reason, the fact that shares in Citibank's investment fund are offered and publicized only through the bank's trust department also lacks significance. Sponsorship by the bank's trust department did not preclude Citibank from sending out a sales flyer announcing its fund, in which anyone could "become a participant by completing the tear-out authorization form on page 13 of the Prospectus and forwarding it with his check to First National City Bank" (A. 170). See also Lovell, *Trust New Business, Development by Commercial Officers,* 104 TRUSTS & ESTATES 1164 (1965).

The real limitations on the content of the selling message are those provided under the Investment Company Act of 1940, which apply as well to Citibank's fund as they do to other mutual funds. See SEC Investment Company Act Release No. 2621 (Oct. 31, 1957). Comparison of Citibank's Prospectus for the fund (A. 146) with those of other mutual funds (A. 43) indicates that there are no relevant differences in the approach to the prospective investor.

2. Judge Bazelon was also mistaken in relying upon the amount of the bank's fee—one-half of 1 percent—as a basis for distinguishing Citibank's fund from other mutual funds. The traditional level of fees for investment advisory services in the mutual fund industry is also one-half of 1 percent or less. See p. 13 *supra.* See also *1966 Hearings, supra* note 11, at 61. (As previously noted, the investment advisory fee is the only fee charged by "no-load" mutual funds.)

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[48] See also *1966 Hearings, supra* note 11, at 95, 110.

Furthermore, management fees do not represent the sole possible financial benefit to banks operating such funds. As noted (p. 38 *supra*), allocation of brokerage fees arising from execution of transactions for the fund's portfolio can produce significant financial benefits, including the acquisition of broker deposit accounts. See also Fiske, *How Banks Pass Out Commissions,* THE INSTITUTIONAL INVESTOR, Dec. 1969, at 30.

3. Finally, Judge Bazelon misplaced reliance upon the factor he deemed the "most important" (A. 270), namely, that under Section 9.11(d) of the Regulation, the Comptroller has power of review over "the fund's investments to see that they are in accordance with sound fiduciary principles" (A. 270).[49]

The "sound fiduciary principles" standard is meaningful in reviewing trust department investments where the bank acts in traditional trust capacities—executor, trustee under will, guardian, etc. In such cases, it provides a basis for disapproval of investments which do not meet the needs of particular trust beneficiaries or which are made in securities not on lists approved by state officials for investment by fiduciaries or are otherwise not in accord with the "prudent man" rule. See 3 SCOTT, LAW OF TRUSTS § 227.13 (3d ed. 1967).

It may also provide a basis for review of investments which involve the bank in self-dealing or other breaches of

[49] The cited Regulation provides:

"(d) As a part of each examination of the trust department of a national bank and as provided by the Manual of Instructions for Representatives in Trusts, the Comptroller of the Currency will examine the investments held by such bank as fiduciary, including the investment of funds under the provisions of § 9.18, in order to determine whether such investments are in accordance with law, this part and sound fiduciary principles."

fiduciary obligations. The "sound fiduciary principles" standard has no meaningful application, however, in reviewing the soundness of the securities purchased for the Citibank fund portfolio since the bank is obliged under the Investment Company Act to purchase securities strictly in accordance with its stated investment policy.[50] The prospectus for Citibank's fund states that the fund's investment policy is to invest principally in those common stocks and securities convertible into common stock "which offer the opportunity for long-term growth of capital . . . in a carefully selected portfolio diversified among various industries" not more than 25 percent of which is to be "in any one particular industry. Purchases and sales of securities will be made on the basis of investment consideration and not for short-term profit" (A. 147). The prospectus further states that the fund will not invest in investment company securities, real estate investment trusts, commodity contracts, or for the purpose of exercising control of management (A. 147-48). The "sound fiduciary principles" standard of Regulation 9.11(d) has been supplanted, insofar as funds registered under the Investment Company Act are concerned, by the obligation to adhere to the terms of the fund's prospectus.[51]

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[50] Sections 8(b)(1), 8(b)(2) and 13(a)(3) of the Investment Company Act, 15 U.S.C. § 80a-8(b)(1), -8(b)(2), -13(a)(3), require that each investment fund have, announce and adhere to an investment policy.

[51] Reliance on the Comptroller's Regulation 9 is in any case open to question. The Comptroller approved Citibank's investment fund under Section 9.18(c)(5), which provides that, in addition to investments to which the detailed requirements of Section 9.18(b) apply, banks may also invest collectively funds received as fiduciary "[i]n such other manner as shall be approved in writing by the Comptroller of the Currency" (A. 268 n. 3).

The Comptroller announced on August 25, 1965, that Regulation 9 would be amended to "include a general provision authorizing

Moreover, limitations on self-dealing and protection against other breaches of fiduciary operations are provided for under the Investment Company Act and the Commission's regulations issued thereunder. See, *e.g.*, Sections 17, 21, 32-38, 15 U.S.C. §§ 80a-17, -21, -31 to -37. The Commission's inspection power—applicable to Citibank's fund as well as to other mutual funds—is provided for under Section 31 of the Investment Company Act, 15 U.S.C. § 80a-30 and the regulations thereunder.

Thus, the differences which Judge Bazelon noted between the bank's fund and mutual funds lack significance.

Furthermore, prominent representatives of both the banking and securities industries concur in the view that, notwithstanding minor operational distinctions, the bank's

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such funds" similar to Citibank's (A. 94). Judge Bazelon recognized that Citibank's fund differed from Regulation 9 and said that "there is accordingly no need to review the provisions of Regulation 9 as it was originally promulgated" (A. 268, n. 3). Thus, the restrictions of Section 9.18(b) appear to be inapplicable to funds like those of Citibank.

Citibank's fund departs from the requirements of Section 9.18(b) and other portions of Regulation 9 as well. For example, Section 9.1(g) limits managing agency accounts to those which impose upon the bank "the fiduciary responsibilities imposed upon trustees under will or deed," and Section 9.18(a)(3) requires that the commingling of managing agency accounts be pursuant to an agreement "expressly providing that such monies are received by the bank in trust." As Citibank advised the Federal Reserve, however (in seeking a favorable ruling on the applicability of Section 32 of the Glass-Steagall Act), such monies are not received in trust. See 12 C.F.R. § 218.111 (1965).

In some respects, the Comptroller's Regulation is more permissive than Citibank's prospectus. For example, Section 9.12(f) of the Regulation permits the bank to lend money to the fund, but under Citibank's prospectus the fund may not borrow money (A. 148).

In short, it is not clear what restrictions, if any, in the Comptroller's regulation limit the operation of Citibank's fund, nor is it clear whether other bank investment funds (see note 53 *infra*) will be limited by the restrictions in Citibank's prospectus where the Comptroller's regulation is more permissive.

fund authorized by the Comptroller is in sum and substance a mutual fund. Thus, in hearings on a bill which would have permitted bank funds of the general type authorized by the Comptroller's Regulations (but under restrictions different from those involved here), the President of the New York Stock Exchange advised Congress that

> "banks operating collective investment funds for managing agency accounts under the bill will be engaging in the same business conducted today by open end investment companies, commonly known as mutual funds." *1966 Hearings, supra* note 11, at 174.

The American Stock Exchange advised Congress that "the banks now wish to establish collective investment funds, offering to the public investment facilities and services not differing significantly from those of ordinary open end, 'mutual' investment funds." *Id.* at 175. The Exchange also stated that "passage of this bill would be a direct repudiation of the policy established by the Glass-Steagall Act. Banks would again be in the securities business . . . ." *Id.* at 177.[52]

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[52] In these same hearings, the Investment Bankers Association of America took the position that "a bank collective investment fund would not differ in any significant respect from an open-end investment company, popularly called a mutual fund." *Id.* at 120.

The Association of Stock Exchange Firms also stated its opposition to the bill:

> "The exchange community, as represented by the Association of Stock Exchange Firms, believes that the decision of Congress to separate the Nation's banks from the securities business still stands—that the Glass-Steagall Act should not be finessed or diluted by piecemeal legislation. We cannot help but believe that the banks would be equally vehement—and equally justified—in their opposition to the other side of this legislative coin: A bill authorizing the reentry of stock exchange member firms into major phases of the commercial banking business." *Id.* at 115.

A statement submitted by the American Bankers Association to Congress in favor of a bill to authorize commingled managing agency accounts underscores the essential similarity between Citibank's fund and other mutual funds. The Association representative stressed that the bill would preclude banks from making daily valuations—a "prohibition [which] places a significant restraint on admissions and withdrawals, so important to the successful operation of a mutual fund." *1966 Hearings, supra* note 11, at 39. See also *id.* at 45-46. The Comptroller, however, permitted Citibank to make daily valuations. See p. 15 *supra.*

The American Bankers Association also stressed the limitation in the proposed legislation which would have prohibited investors from participating in the fund unless their initial investment was at least $10,000. *1966 Hearings, supra* note 11, at 39, 46. The Comptroller's regulation, however, has no minimum amount prescribed. Furthermore, there are several applications on file with the Securities and Exchange Commission by banks proposing to sponsor funds which provide for minimum investments of $5,000.[53] One national bank is "actively considering" a fund providing for a $2,500 minimum investment. Brief for the Comptroller in Opposition to Certiorari, at 6 n. 6.

Former SEC Chairman Cohen said that bank-sponsored commingled funds are "essentially the same as mutual

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[53] See, *e.g.*, First Minneapolis Growth Fund (File No. 2-36569-1); First Minneapolis Income Fund (File No. 2-36570-1); Continental Bank Growth Fund, Chicago (File No. 2-36450-1); Continental Bank Security Fund, Chicago (File No. 2-36449-1); First Chicago Growth Fund (File No. 2-35935-1); First Chicago Investment Fund (File No. 2-35934-1); Northwestern Investment Fund, Minneapolis (File No. 2-35828-1); C & S Investment Fund, Atlanta (File No. 2-35003-1).

funds." *Hearings on H.R. 14742 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess., at 122 (1968). Former SEC Chairman Cary said that the Comptroller's regulation "permits banks to engage in what is hardly distinguishable from the mutual fund business." *1963 Hearing, supra* note 9, at 7. The chairman of the Federal Deposit Insurance Corporation stated that the Comptroller's regulation authorizes "bank entry in the mutual fund business." *1966 Hearings, supra* note 11, at 276. See also S. REP. No. 1351, 90th Cong., 2d Sess. 10-12 (1968).[54]

Therefore, Citibank's fund is a mutual fund, and the Comptroller, by implementing his Regulation 9 to authorize that fund, has in fact authorized the bank to engage in the issuance, sale, distribution and underwriting of securities, each of which activities violates the Glass-Steagall Act.[55]

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[54] The 1969 Annual Report of the First National City Corporation (a one-bank holding company formed in 1968), p. 16, filed with the SEC February 12, 1970, described this suit as one which seeks to block bank operation of "mutual-type funds."

[55] It follows that the Court of Appeals was in error in holding that the question presented was one involving the review of an exercise of agency expertise. Such a standard of review is inapposite in cases asserting that administrative action is not authorized by statute. See *First National Bank* v. *Dickinson*, 396 U.S. 122 (1969); *NLRB* v. *Brown*, 380 U.S. 278, 292 (1965); *NLRB* v. *Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477, 499-500 (1960); *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 677-78 (1954); *Elgin, Joliet & Eastern Ry.* v. *Benj. Harris & Co.*, 245 F. Supp. 467, 472 (N.D. Ill. 1965). As this Court has stated:

> "Administrative determinations must have a basis in law and must be within the granted authority. . . . An agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946) (footnote omitted).

II. A BANK MUTUAL FUND IS NOT IMMUNE FROM THE GLASS-STEAGALL ACT SIMPLY BECAUSE IT IS OPERATED BY THE BANK'S TRUST DEPARTMENT.

Absent exemption from the Glass-Steagall Act, banks cannot directly or indirectly engage in the securities business without violating one or more of Sections 16, 20, 21 and 32. It is implicit in the decision below, particularly in the opinion written by Judge Bazelon, that such an exemption from Glass-Steagall arises in favor of securities dealings by banks when conducted under the aegis of their trust departments. Such a holding can only be justified if: (1) the Glass-Steagall Act does not apply to securities dealings by a bank when the bank has a "fiduciary" obligation to its customer; and (2) 12 U.S.C. § 92a (which provides for the granting of trust powers by the Comptroller to national banks) authorizes the Comptroller to grant exemptions from the Glass-Steagall Act. Neither proposition is valid.

A. No Immunity Arises From the Mere Fact That the Bank Has a "Fiduciary" Obligation Towards Investors in Its Fund

Nothing in the Glass-Steagall Act warrants the conclusion that it is inapplicable here simply because a "fiduciary" label has been affixed to the bank's fund by the Comptroller and Citibank.[56] Indeed, it was the breach by banks of their "fiduciary" obligations which caused Congress to pass the

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[56] The provision in Section 16 which permits banks to buy and sell securities "for the account of customers" has nothing to do with a distinction between securities dealings conducted in a fiduciary capacity and those conducted in other banking capacities. The purpose of that provision was simply to allow banks to accommodate existing customers by executing their stock market orders. See pp. 27-29 *supra*.

Glass-Steagall Act in the first place. The Report of the Committee on Currency and Banking stated:

> "Commercial banks found a fertile field among [their] depositors for purchasers of security issues which their investment affiliates were sponsoring. These banks, violating their fiduciary duty to depositors seeking disinterested investment counsel from their bankers, referred these depositors to the affiliates for advice." S. REP. No. 1455, 73rd Cong., 2d Sess. 163 (1934).

The Report further found

> "A great many of these evils [disclosed in Senate Subcommittee Hearings] were, however, attributable to the utter disregard by officers and directors of commercial banks and investment affiliates of the basic obligations and standards arising out of the fiduciary relationship extending not only to stockholders and depositors, but to persons seeking financial accommodation or advice. The hearings disclosed, on the part of many bankers, a woeful lack of regard for the public interest and a proper conception of fiduciary responsibility." *Id.* at 185.

Thus the Glass-Steagall Act was meant to reach bank activities even if conducted in the exercise of its fiduciary responsibility.

B. 12 U.S.C. § 92a Neither Authorizes Regulation 9 Nor Confers Immunity From the Glass-Steagall Act

Section 92a does not authorize the Comptroller to immunize conduct which would otherwise violate the Glass-Steagall Act. The statute simply concerns the granting of corporate authority to act in a trust capacity—"as trustee, executor, administrator, registrar of stocks and bonds,

guardian of estates, assignee, receiver, committee of estates, lunatics, or in any other fiduciary capacity in which State banks . . . are permitted to act under the laws of the State in which the national bank is located.[57] Like any other grant of corporate authority conferred by statute or by charter, it cannot be escalated into a license to violate the provisions of substantive law. For example, it is clear that the authority granted national banks to merge under 12 U.S.C. § 215a does not immunize bank mergers from prosecution under the antitrust laws. See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-52 (1963).

Section 92a does not explicitly confer any immunity from the Glass-Steagall Act. Nor is there a repugnancy between the two statutes which requires reconciliation here. Compare *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963).

The term "fiduciary" covers so many activities (*e.g.*, the practice of law) which are far removed from traditional trustee services that Congress cannot reasonably be deemed to have given the Comptroller authority to allow bank trust departments to engage in any activity which he or a State[58] might conclude involves "fiduciary" obligations. A mutual fund's obligations to its shareholders are no less "fiduciary" than those of the Citibank fund.

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[57] While Section 92a authorizes the Comptroller to grant trust powers to national banks in states where similar powers are granted to state banks, the fact that New York would now authorize its banks to engage in such activity has no bearing on the lawfulness of the Comptroller's action under the Glass-Steagall Act, since state banks are likewise subject to the prohibitions of the Glass-Steagall Act.

[58] Cf. 19 Fed. Res. Bull. 188 (1933):

"The fact that corporate fiduciaries in at least one State are permitted by State law to invest trust funds collectively in real-estate mortgage pools in this manner was brought to

Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency, 76th Cong., 3d Sess. 46 (1940). See also H. Rep. No. 2639, 76th Cong., 3d Sess. 10 (1940); S. Rep. No. 1775, 76th Cong., 3d Sess. 12 (1940). There is no basis for an inference that Congress meant the Glass-Steagall prohibitions to give way before whatever powers labeled "fiduciary" are dispensed by the Comptroller under Section 92a.

Indeed, other legislation suggests that Congress would not have regarded Citibank's commingling of managing agency accounts as a "fiduciary" activity under Section 92a. Thus, in Section 584 of the *Internal Revenue Code*, Congress exempted from taxation common trust funds maintained by a bank in its capacity as "trustee, executor, administrator, or guardian." This would not include Citibank's commingled managing agency fund. See pp. 7-8 *supra*. Similarly, Section 3(c)(3) of the Investment Company Act, 15 U.S.C. § 80a-3(c)(3), exempted "any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of moneys contributed thereto by the bank in its capacity as a trustee, executor, administrator or guardian . . ." but again, this would not include Citibank's commingled managing agency fund. Former SEC Chairman Cary testified in House hearings in 1963 that the basis for this distinction was "the assumption that the traditional common trust fund as circumscribed by the Federal Reserve Board could be used only for bona fide fiduciary purposes and not as a vehicle for general investment by the public." *1963 Hearing, supra* note 9, at 4.

The promotion and sale by a bank of an investment fund in form composed of commingled managing agency ac-

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the board's attention when it was considering this question; but the board held that this did not authorize national banks to engage in such practices."

counts is far removed from the trust concepts of Section 92a. As Chief Judge Bazelon noted, this is a "new and free-wheeling activity" (A. 272). The Federal Reserve, which supervised trust powers of national banks from 1913 until 1962, consistently warned against abuse of the authority to employ common trust funds, strictly limiting them to trusts created for "bona fide" or "strictly fiduciary purposes." 24 FED. RES. BULL. 4-5, 10 (1938). The Board stated that it was "improper" for a bank to use "the common trust fund as a medium attracting individuals primarily seeking investment management of their funds." 42 FED. RES. BULL. 228 (1956). See also 26 FED. RES. BULL. 393-94 (1940); 41 FED. RES. BULL. 142 (1955).

The factor which distinguishes accepted trust activity from a public investment medium such as a mutual fund is the element of continuing personal attention to the customer's individual needs. As former SEC Chairman Cohen stated:

> "The commingling of managing agency accounts represents a departure from traditional banking practice . . . . Previously, the relationships between the bank and the persons for whom it acted arose from individually negotiated trust agreements, individually negotiated managing agency accounts, or similar arrangements, and the commingled fund itself was never presented as an investment medium to the general public. The proposal to [authorize banks to operate mutual funds] removes the element of individualized relationships and replaces it with a standard investment package offered on an identical basis to all comers." *1966 Hearings, supra* note 11, at 136-37.

A similar distinction was drawn by Reese Harris, Vice President, Trust Division, American Bankers Association, whose testimony before Congress indicated that a bank collective fund for managing agency accounts would lack

sufficient "fiduciary" characteristics to distinguish it from a mutual fund unless:

(1) the managing agency accounts come into existence prior to the time that the bank establishes its collective fund. "By contrast," Mr. Harris noted, "a person who buys shares in a mutual fund does so exactly as he buys shares in any other corporation"; and

(2) the bank has discretion whether to commingle any part of the customer's funds, so that there can be no "possibility of a managing agency contract providing for the direct or automatic investment of management agency account in a collective fund." *1964 Hearings, supra* note 9, at 87, 88.[59]

Citibank's fund fails on both tests set out by Mr. Harris. The investor creates the managing agency as he tenders his money, exactly as he buys shares in a mutual fund. Second, there is no exercise of discretion by a trust officer and no element of individualized relationship. The only information required from the participant in the tear-out

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[59] Former Comptroller Saxon has emphasized that the bank's retention of discretion in determining whether to commingle funds is a controlling element of a true fiduciary relationship, even for managing agency accounts:

> "Now, in all of these funds, it is the bank itself which exercises the discretion as to whether the funds of particular accounts shall go into a common trust fund.
>
> "In our own regulation, for example, the investment discretion makes the relationship an agency trust, rather than simply an agency. It is the discretion exercised by the bank in putting a trust customer's funds either into a common trust fund or elsewhere, which is significant.
>
> "People, too, aware that common trust funds exist, in entering into a fiduciary relationship may request or otherwise provide for collective investment as a permissible form of investment.
>
> "Fundamentally, though, the discretion lies in the bank." *1963 Hearing, supra* note 9, at 50.

authorization form is his name, address and social security number (A. 158). All of the funds so tendered by the investor are directly and automatically invested in the collective fund. The fund's Prospectus so requires (A. 147), and the Affidavit of City Bank's executive vice president shows that the bank at no time weighs the possibility of not investing the customer's money in the commingled account (A. 197). As Judge Bazelon noted of the bank's claim that it gave individual attention to each investor's particular needs:

> "The Bank's affidavit states that it will accept the customer's money if it is satisfied that the Account's investment policy is suited to his needs. It appears from the mailing to 'valued customers,' however, that they will be acceptable if they read the invitation, with its caveats, and the prospectus and send in the tear-out authorization with $10,000" (A. 275, n. 9).

In short, the operation by a bank trust department of an open-end investment fund like Citibank's is devoid of the personal trust concepts of Section 92a and is indistinguishable from a mutual fund. There is accordingly no basis for inferring that Congress intended either to authorize bank operation of such funds under 12 U.S.C. § 92a or to grant exemptions in their favor from the Glass-Steagall Act.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the cause should be remanded to that court to enter judgment affirming the judgment of the District Court.

Respectfully submitted,

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May 22, 1970

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 61

INVESTMENT COMPANY INSTITUTE, ET AL.

v.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE COMPTROLLER OF THE CURRENCY

OPINIONS BELOW

The opinion of the district court (App. 206–247) is reported at 274 F. Supp. 624. The opinion of the court of appeals (App. 263–310) is reported at 420 F. 2d 83.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1969, and a timely petition for rehearing was denied on August 15, 1969. The petition for a writ of certiorari was filed on November 12, 1969, and was granted on March 23, 1970 (397 U.S. 986). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether mutual funds, salesmen of mutual funds, and mutual fund investment advisers and underwriters, have standing to challenge the operation of commingled managing agency investment accounts by national banks under regulations promulgated by the Comptroller of the Currency or, assuming standing, whether these parties have a "legal interest" which entites them to protection from the statutory violations they allege.

2. Whether the operation of a commingled managing agency investment account is within the fiduciary powers granted national banks (12 U.S.C. 92a) and consistent with the prohibitions of the Glass-Steagall Act against bank involvement in the securities business (12 U.S.C. 24, 78, 377, 378).

STATUTES AND REGULATION INVOLVED

Pertinent portions of Sections 16, 20, 21 and 32 of the Glass-Steagall Act, as amended (12 U.S.C. 24, 377, 378 and 78); 12 U.S.C. 92a; and of Regulation 9 of the Comptroller of the Currency (12 C.F.R. 9), are set forth in Appendix A, *infra*, pp. 49–61.

STATEMENT

1. Petitioners, an association of mutual funds, mutual fund salesmen, and mutual fund investment advisers and underwriters, and certain members of that association, brought this action to invalidate regulations of the Comptroller of the Currency (12 C.F.R. 9.18), which permit national banks to operate commingled managing agency investment accounts on spe-

cified terms. In particular, petitioners sought to enjoin the Comptroller from permitting the respondent First National City Bank (the Bank) to operate such an account.

The complaint alleged that the operation of a commingled managing agency investment account under the Comptroller's regulations are not within the fiduciary powers granted national banks by 12 U.S.C. 92a, and is inconsistent with the prohibitions of the Glass-Steagall Act against bank involvement in the securities business (12 U.S.C. 24, 78, 377, 378). Petitioners further asserted that the "illegal activity" authorized by the Comptroller would subject mutual funds, salesmen of mutual funds, and mutual fund investment advisers and underwriters, to "illegal competition" which will "deprive them of legitimate business," cause "loss of opportunities for profit in their trade," and "dilute, divert, and withdraw a substantial portion of the potential market" for mutual fund securities and mutual fund services. Although the complaint asserted that the Glass-Steagall Act prevented mutual funds, salesmen of mutual funds, and mutual fund investment advisers and underwriters, from "expanding their operations into the commercial banking business," no claim was made that the Comptroller's regulations or action challenged here (authorizing Citibank's commingled managing agency investment account) imposed any restriction, burden, or duty upon petitioners (App. 5–17).

2. A national bank with a trust department is authorized "to act as trustee, executor, administrator,

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registrar * * *, guardian * * *, assignee, receiver, * * * or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located" (12 U.S.C. 92a). The Federal Reserve Board, which regulated the fiduciary activities of national banks from 1913 until 1962, allowed national banks holding trust funds or pension, profit-sharing, or stock bonus plan funds to pool these funds together when authorized to do so by the governing instrument or by local laws.[1] Commingling allowed the pooled funds to share administration expenses, thus reducing the service and management fees charged by the bank to each individual fund, and also allowed the diversification of assets required for a sound investment program (App. 190–191).

Another longstanding fiduciary service authorized by 12 U.S.C. 92a is the "managing agency," under which the bank buys, sells and holds securities for the account of a customer as the customer's agent.[2] Before 1962, the Federal Reserve Board did not permit managing agency funds of individuals [3] to be pooled, so that it was not economically feasible for a bank to accept from individ-

[1] See 2 F.R. 2976 (1937); 20 F.R. 3305 (1955).

[2] See App. 189–190; 1934 Fed. Res. Bull. 609; 1 Scott, *Trusts* (3d ed.) § 8.1, pp. 80–81. 12 U.S.C. 24 provides in part that national banks may deal in securities and stock "upon the order, and for the account of, customers * * *."

[3] Corporate pension, profit sharing and stock bonus plan funds held by the banks in the capacity of managing agent were permitted by the Federal Reserve Board's 1955 regulation to be invested collectively. 20 F.R. 3305.

uals a managing agency account of less than $100,000, because the cost of managing a smaller account was not covered by the usual charge of approximately one-half percent annually (App. 190–191, 195–196).

In 1962 Congress transferred the supervision of the trust activities of national banks from the Federal Reserve Board to the Comptroller of the Currency. 76 Stat. 668. The Comptroller thereafter requested all affected banks to submit recommendations as to how the then existing fiduciary regulations might be improved (App. 189). The response was voluminous, and the Comptroller appointed a committee of experts to study those regulations and recommend revisions (*ibid.*; 42 Trust Bulletin No. 6, p. 10 (1963)). Based upon this committee's recommendations, new regulations were proposed covering the entire field of trust powers of national banks, and among them was a proposed authorization for the pooling and collective investment of funds held by banks in the capacity of managing agent (App. 191–192; 28 F.R. 1111 (1963)).[4] After receiving and considering com-

[4] The Federal Reserve Board had been considering a similar authorization for some time before the supervision of trust activities was transferred to the Comptroller, but the Board "had not come to the conclusion that this was a desirable thing at the time the transfer was made." Testimony of Chairman Martin, Hearings on H.R. 8499 and H.R. 9410 before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 88th Cong., 2d Sess., p. 108 (1964).

When the Board restricted the common trust fund to "bona fide fiduciary purposes" and refused to sanction commingled managing agency accounts (2 F.R. 2976(1937)), it was exercising the discretionary powers conferred upon it by 12 U.S.C. 92. The foregoing limitations were *not* based upon the Board's

ments, including those of the petitioner Investment Company Institute, the Comptroller promulgated a new set of regulations to govern all the trust activities of national banks (12 C.F.R. Part 9), and these regulations included authorization, on specified terms, for the collective investment of managing agency funds (12 C.F.R. 9.18(a)(3)).

The Securities and Exchange Commission also considered such commingled accounts from its regulatory viewpoint, and concluded that—in addition to the protections enumerated in the Comptroller's regulations and further provided by his regular bank examinations—bank customers participating in such accounts also required the protections provided by the Investment Company Act of 1940 and the Securities Act of 1933. Thus, it concluded that a commingled account should be treated as an investment company and the participants should be given certificates of interest registered with the Commission as securities (see App. 192–193).

The addition of these Commission requirements created some inconsistencies with the Comptroller's regulations. For example, the Comptroller required a bank administering such a collective investment fund

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construction of the Glass-Steagall Act. For example, in 1955 the Board permitted the commingling and common administration by banks of pension and profit sharing funds without any limitation that such funds be established for "bona fide fiduciary purposes." 20 F.R. 3305 (1955). When Congress transferred the supervision of the trust activities of national banks to the Comptroller in 1962, it vested the Comptroller with the continuing discretionary authority over trust activities that had formerly resided in the Board.

to have "the exclusive management thereof" (12 C.F.R. § 9.18(b)(12)); but the Investment Company Act contemplated governance by a board of directors, a majority of whom could not be affiliated with the managing bank (see 15 U.S.C. 80a–10(b)(3), (c)). Similarly, the Comptroller's regulations prohibited the issuance of any certificate or other document "evidencing a direct or indirect interest in such fund" (12 C.F.R. 9.18(b)(13)), while the Securities Act required certificates to be issued and registered with the Commission.

The respondent First National City Bank prepared a plan for a commingled managing agency account which the Bank believed would satisfy all of the various pertinent regulatory requirements. A customer with $10,000 or more [5] which he wished to be managed by the Bank would execute a written agreement appointing the Bank managing agent and specifically authorizing the customer's funds to be commingled with those of other customers signing similar agreements (App. 158). The customer would receive a document stating the number of "units of participation" he held as an undivided interest in the pooled fund (App. 134). The fund would be governed by a committee of five persons elected annually by the participants; the original committee would include three officers of the Bank, and it was contemplated that a

[5] This $10,000 minimum is not required by the Comptroller's regulations. The Comptroller's Office advises us that one national bank has submitted to the Comptroller and the Commission for approval a collective investment fund, similar to the one here involved, with a $5,000 minimum, and another national bank is actively considering a $2,500 minimum.

majority of the committee would continue to be Bank officers (App. 101, 153, 154–155, 202). The Bank was to be the investment adviser to the collective fund and the custodian of its assets; *for purposes of the securities laws,* the Bank would also be considered to be an underwriter of the units of participation (App. 104–108, 136–144). The units of participation would be registered with the Commission as securities (see App. 95–133) and a prospectus made available to prospective investors (see App. 146–157).

This plan was filed with and found satisfactory by the three federal agencies concerned. The Comptroller found that the Bank would be exclusively responsible for the operation of the collective investment fund and would administer it just as it would any other fiduciary service. He therefore granted to the fund a specific approval under 12 C.F.R. 9.18(c)(5), thus allowing the fund to be established with some modifications of the pattern set forth in 12 C.F.R. 9.18 (App. 194–205).[6] The Federal Reserve Board likewise viewed the fund as a part of the Bank for purposes of the banking laws, and therefore ruled that the participation of Bank officers on the committee of the fund would not be an affiliation with an issuer of or

[6] Thus Judge Bazelon's concurring opinion below noted (App. 268):

"The Bank's plan does not conform in all respects to Regulation 9 as originally issued due to the adjustments required to satisfy the requirements of the Investment Company Act. The plan, as amended, received the Comptroller's written approval under 12 C.F.R. § 9.18(c)(5), and it is expected to set the pattern for other bank-sponsored investment funds. There is accordingly no need to review the provisions of Regulation 9 as it was originally promulgated."

dealer in securities, prohibited by Section 32 of the Glass-Steagall Act, 12 U.S.C. 78 (see 12 C.F.R. 218.111).[7] The Commission concluded that certain provisions of the Investment Company Act were not intended to apply to a bank-sponsored collective investment fund, particularly in light of the additional protection provided to the fund's participants by the Comptroller's regulations. The Commission therefore granted certain exemptions from the Investment Company Act that would, *inter alia,* permit a majority of the account's governing board to be Bank officers.

In accordance with the approval granted by these three federal agencies, the Bank established a commingled managing agency account (the "Account") in 1966 and that Account is now in operation (App. 199–201). We summarize below the essential characteristics of the Account.

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[7] With respect to the question whether Section 21 of the Glass-Steagall Act applies, the Board's ruling "expressed no position," explaining that "since section 21 is a criminal statute, the Board has followed the policy of not expressing views as to its meaning." 12 C.F.R. 218.111 (k).

[8] The National Association of Securities Dealers, which had intervened before the Commission in opposition to the request for exemption, challenged the exemption in the court below. The court upheld the exemption in the same opinion in which it upheld the Comptroller's regulation. The validity of the exemption is the issue in the companion case of *National Association of Securities Dealers* v. *Securities and Exchange Commission*, No. 59, which is scheduled to be argued immediately before the present case. The Commission is not defending its order before this Court, but the Solicitor General is filing in that case a brief *amicus curiae* in behalf of the United States, in which he argues that the Commission properly granted the exemption.

3. Under the plan, a bank customer tenders his funds (between $10,000 and $500,000) to the Bank together with a broad authorization and power of attorney making the Bank the customer's managing agent. The authorization specifically provides for the Bank's investment of the customer's funds, together with the funds of other customers who have given the same authorization, through a commingled investment account. If the Bank is satisfied that the investment policy of the Account is suitable for the individual customer's needs, it accepts his money, and, as his agent, adds that money to the Account on one of the specified valuation dates.[9]

The customer's undivided interest in the Account is expressed in terms of units of participation, which are represented by a non-negotiable receipt. The customer may withdraw from the Account on any valuation date. Because of the underlying principal-agency relationship, his interest in the account terminates upon his death or incompetency, in which event his funds are withdrawn from the Account and held for his legal representatives (App. 134, 197–198, 203–204).

The custody and investment of the customer's funds are handled by the Bank pursuant to a management agreement between the Bank and the Account. The funds are invested, within certain guidelines, in accordance with the broad discretionary directions of the trust department officer or officers assigned to the Ac-

[9] The market value of the assets of the fund is computed regularly, so that the net value of each unit of participation can be established. Each such computation is made on a valuation date (App. 204).

count. The Comptroller's regulations limit the total compensation of the Bank to the sum of the fees it would normally charge its customers for separate management of their accounts. The Bank's compensation is limited to a sum equal, on an annual basis, to one-half percent of the average net asset value of the Account.[10] Unlike the situation of most mutual funds—where the investor pays a sales charge and underwriters, brokers, and securities dealers make profits from the distribution of mutual fund shares—the customer-investor under the instant plan pays no charge for participating in the Account, nor does the Bank or anyone else receive any commission or other profit for arranging the participation (App. 136–142, 198–199, 202–205).

Moreover, unlike most mutual funds—which are aggressively marketed through all channels of public distribution by investment companies, their principal underwriters, brokers, and securities dealers[11]—partici-

[10] Most mutual fund investment advisers make a similar charge. Unlike the bank's fund, however, mutual fund advisory fees usually do not include costs of charges for "stock transfers, dividend disbursing, and custodial services, the most substantial nonadvisory services required by mutual funds * * *." Report of the Securities and Exchange Commission on Public Policy Implications of Investment Company Growth, H. Rep. No. 2337, 89th Cong., 2d Sess. 10 (1966). In addition, most mutual funds also charge a sales fee or "load" constituting a percentage of the amount invested (*id.* at 19).

[11] "Principal underwriters [of mutual funds] use two different distribution techniques. Some confine themselves to wholesaling and leave the actual selling to independent retail dealers. Others have their own retail sales organization called "captive sales forces." In either case, the growth of the funds through the sale of new shares increases the advisory, the underwriting and, in an appreciable number of instances, the brokerage income of those who control them." H. Rep. No. 2337, *supra*, p. 11, fn. 10, at 9.

pation in the Account is offered only by the Bank itself as a part of its fiduciary services. There is no public distribution of participations in the Account through underwriters, brokers, dealers or any other marketing agency. The Account merely agrees to make units of participation available to customers of the Bank upon request of the appropriate officer. The Comptroller's Regulation prohibits advertising a collective investment account, except in connection with the Bank's general fiduciary services. The Regulation also limits the Bank's publicizing of its investment record.

The Account, like other banking functions, is subject to the constant examination and supervision of the Comptroller, including scrutiny of the Account's investments. The Comptroller's Regulation preserves the fiduciary character of the Bank's relationship to its customers by requiring the separation of the Account's funds from other assets, by barring the Bank from possessing any interest in the Account, and by enforcing other normal fiduciary obligations such as avoidance of self-dealing and conflicts of interest (App. 141, 198–200, 202, 204–205, 269–270; 12 C.F.R. 9.11(d), 9.18; 12 U.S.C 481).[12]

[12] Petitioners state (Br. 45, fn. 51) that the restrictions of Section 9.18(b) of the Comptroller's Regulation "appear to be inapplicable to funds like those of Citibank." While the Comptroller allowed the Bank's fund to be established with some modifications of the pattern set forth in Section 9.18, he specifically stated that "all of the protections deemed necessary by this Office," provided by Section 9.18(b), must be

The Comptroller and the Federal Reserve Board concluded that the essential nature of the commingled account is not altered by the additional safeguards

complied with (App. 205). The specific changes in operation allowed by the Comptroller are listed below.

1. Section 18(a)(3) of Regulation 9, 12 C.F.R. 9.18(a)(3), provides for the operation of a commingled account as a common trust fund for funds received by the bank as managing agent under an express trust agreement. The Account as established does not provide for an express trust agreement; rather, each customer deposits his funds with the bank together with a broad power of agency specifically authorizing the bank to deposit those funds in the Account and to invest and reinvest them at its discretion (App. 159). See Pet. Br. pp. 53–55.

2. Section 18(b)(12), 12 C.F.R. 9.18(b)(2), provides that the bank administering a commingled account shall have the exclusive management thereof. The Account as established is supervised by a committee, elected annually by the participants, which enters into an agreement with the bank for the management of the Account (see *infra*, p. 14). In the four years of operation of the Account, this committee has always contained a majority who were officers of the Bank's Trust and Investment Department (see App. 198).

3. Section 18(b)(5), 12 C.F.R. 9.18(b)(5), provides for audit by auditors responsible only to the board of directors of the bank. In accordance with the provisions of the Investment Company Act, the Account as established provides for the annual approval of the auditors by vote of the participants. 15 U.S.C. 80a–31.

4. Section 18(b)(13), 12 C.F.R. 9.18(b)(13), forbids the issuance of any certificate or other document evidencing a direct or indirect interest in a common trust fund. The Account as established requires the issuance of a receipt showing the units of participation credited to a customer's account. These receipts are not negotiable.

Although the Comptroller allowed changes in the operation of the Account in order to satisfy the requirements of the Investment Company Act, the Account still retained the essential characteristic envisaged by the Comptroller's regulations and

which were established to satisfy the Securities and Exchange Commission and the requirements of the Investment Company Act (App. 192–193; 205; 12 C.F.R. 218.111; App. 278, 309–310). These additional safeguards are: (a) The Account is supervised by a five-member committee originally appointed by the Bank and elected annually by the participants in the Account. (b) The Investment Company Act required two of the five members of the committee to be unaffiliated with the Bank (App. 269), although the majority of the committee has been, and is expected to be, controlled by the the Bank. (c) The committee enters into an agreement with the Bank for the Bank's management of the Account, which agreement may be cancelled by a majority of the committee at any time (App. 141). (d) The management agreement, whose terms are detailed above, *supra,* expires annually unless renewed upon majority vote of the participants or of the committee (including a majority of the non-Bank affiliated members), and is otherwise subject to conditions imposed by the Investment Company Act of 1940 (App. 141; 15 U.S.C. 80a–15). (e) The investment policy of the Account may be changed only by a majority vote of the participants (15 U.S.C. 80a–13).

Within the broad outlines of the Account's fundamental investment policy, however, the Bank, until

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was, of course, approved by the Comptroller. The protections extended to a customer whose money is accepted by the Account are, by virtue of the subjection of the Account to the Investment Company Act requirements, even greater than they would be if the Account were under the exclusive direction of the Comptroller. See *supra*, p. 14.

such time as its management agreement is cancelled or expires without renewal, retains exclusive control of the Account.

4. After the Account was established, petitioners brought this action in the district court for declaratory and injunctive relief, seeking to have the Comptroller's regulations declared unlawful and the operation of the Account prohibited. The district court granted petitioners' motion for summary judgment, holding that "the provisions of Regulation 9 which allow commingling of managing agency accounts do not comply with the statutory provision [*sic*] of the Glass-Steagall Act and are, therefore, illegal" (App. 247).

The court of appeals unanimously reversed (Pet. App. 2a–3a). In a brief *per curiam* opinion, the court stated that, "[o]n the merits, we are agreed that the actions taken by the Securities and Exchange Commission and the Comptroller are fully consonant with the statutes committed to their regulatory jurisdictions" (App. 266). The members of the panel went on to elaborate their views in separate concurring opinions, one by Chief Justice (then Judge) Burger, with whom Judge Miller joined, and another by Chief Judge Bazelon.

Judge Burger's opinion stated (App. 309–310):

> Our review function is narrow and limited; it does not include the power to decide whether the public will be better served by one or the other modes of investing funds so as to achieve diversifications, yield, safety or low cost. All

> that is the primary responsibility of the special regulatory bodies established by Congress for that purpose. * * *
>
> Here, the Comptroller of the Currency, after study, has decided that the commingled managing agency account is a function which is authorized by law for banks and is in the public interest; the Securities and Exchange Commission and the Federal Reserve Board have approved. Other state and federal regulatory bodies are in accord. The regulatory bodies charged by Congress with these large responsibilities have construed the grant of power and with their accumulated expert experience have decided these issues. Their decisions are entitled to substantial deference and on this record I see no basis for disturbing their conclusions.

Judge Bazelon's opinion discussed in detail each of the aspects of the case (App. 266–286), and concluded that "the [commingled managing agency] Account, subject to the mutually reinforcing regulations imposed by the Comptroller and the Commission, was established in accordance with law" (App. 267).[13]

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[13] While Judge Burger and Judge Miller expressed their "grave doubts" as to petitioners' standing to maintain the action, they nevertheless resolved those doubts in petitioners' favor (App. 309). Judge Bazelon was of the view that petitioners have standing (App. 286–296). The decision in this case was rendered prior to this Court's elaboration of the standing and "legal interest" requirements in *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 ("ADAPSO"). In Point I of the Argument, we urge that petitioners cannot meet the standing and "legal interest" requirements set forth in *ADAPSO*.

SUMMARY OF ARGUMENT

Petitioners—mutual funds, salesmen of mutual funds, and mutual fund investment advisers and underwriters—brought this action to challenge the right of national banks to operate commingled managing agency investment accounts pursuant to a regulation promulgated by the Comptroller of the Currency. They contend that the performance of such service is not within the fiduciary powers granted national banks (12 U.S.C. 92a) and is inconsistent with the prohibitions of the Glass-Steagall Act against bank involvement in the securities business (12 U.S.C. 24, 78, 377, 378).

I. Petitioners have no standing to maintain this suit. They complain that the effect of national bank activity in this area will be to provide competition to mutual funds. They do not contend that the Comptroller is attempting to regulate their own activities in any fashion or that they are threatened with any injury other than competitive.

The sole purpose of the Glass-Steagall Banking Act of 1933, upon which petitioners rely, was to protect the banking public through the maintenance of a sound national banking system. Congress did not intend to confer any benefits upon, or to afford any protection to, mutual funds or any others in the securities field. In such circumstances, petitioners lack standing to challenge the operation of a commingled managing agency investment account, for the interest sought to be protected by petitioners is not "arguably within the zone of interests to be protected or

regulated" by the Glass-Steagall Act or any other relevant statute. *ADAPSO, supra,* 397 U.S. 150, 153. In any event, under this Court's decision in *ADAPSO,* 397 U.S. at 153, the judgment below must be affirmed on the ground that petitioners have no legal interest which protects them from the statutory violations which they allege, and therefore are not entitled to obtain judicial relief on the basis of those statutory claims.

II. Operation of a commingled managing agency investment account is consistent with the prohibitions of the Glass-Steagall Act against bank involvement in the securities business, because participating interests in the Account are not "securities" within the meaning of that Act. The definition of "securities" in the securities laws is inapplicable to the banking laws. As Judge Bazelon noted in the court below (App. 274), the term "security" in the Securities Act of 1933 is a "term of art with a high gloss", whose "expansive definition under the Securities Act cannot be imported wholesale into the Glass-Steagall Act when the two statutes serve different purposes * * *."

The proper line of inquiry in this case is not whether the certificates issued to participants in the Account are securities under the securities laws, but instead whether operation of the Account is consistent with the purposes of the Glass-Steagall Act. The legislative history of the Glass-Steagall Act demonstrates that Congress attempted in that Act to separate commercial and investment banking, and to safeguard

commercial banks from making excessively speculative financial commitments, which were fraught with potential conflict of interest problems, by prohibiting banks from purchasing, issuing and underwriting securities. The Act was not intended to limit the traditional function of banks to manage the investments of their customers in a fiduciary capacity, whether through individual or commingled accounts. The Account here, which simply makes available to the smaller investor the benefit of investment management by a bank trust department which was formerly available only to large investors, presents, as Judge Bazelon noted, no potential problems which are not present "in all bank investments in securities for the account of customers" (App. 275). Since these problems were not those that Congress had in mind when it enacted the Glass-Steagall Act, operation of the Account does not violate the purposes of that Act.

III. Once it has been determined that operation of the Account is not inconsistent with the purposes of the applicable banking statutes, the complex questions about the appropriateness of such accounts in general and the details of their operation are questions for the regulatory agencies charged with administration of the banking laws. As Judge Burger noted in his concurring opinion below, the Comptroller and the other regulatory bodies have considered the issues presented here with "their accumulated expertise", and in view of the fact that they have not exceeded their statutory discretion, there is "no basis for disturbing their conclusions" (App. 310).

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ARGUMENT

I

PETITIONERS—MUTUAL FUNDS, SALESMEN OF MUTUAL FUNDS, AND MUTUAL FUND INVESTMENT ADVISERS AND UNDERWRITERS—HAVE NO STANDING TO CHALLENGE THE OPERATION OF COMMINGLED MANAGING AGENCY INVESTMENT ACCOUNTS BY NATIONAL BANKS UNDER REGULATIONS PROMULGATED BY THE COMPTROLLER. IN ANY EVENT, PETITIONERS HAVE NO LEGAL INTEREST WHICH PROTECTS THEM AGAINST THE STATUTORY VIOLATIONS WHICH THEY ALLEGE.

Even though these issues were extensively considered below, petitioners make no attempt in their brief in this Court to demonstrate either that they have standing to maintain this action or that, assuming standing, they have a "legal interest" which entitles them to relief from the statutory violations they allege. But this Court's recent decision in *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (hereafter "*ADAPSO*") plainly requires consideration of these issues.[14]

ADAPSO held that the standing of a plaintiff to attack governmental action assisting a competitor depends upon (1) the existence of a case or controversy (for which "injury in fact" is sufficient); and (2) "whether the interest sought to be protected by the

[14] The Court noted in *ADAPSO* (397 U.S. at 157, fn. 2): "We intimate no view, under the decisions rendered today here and in Barlow v. Collins * * * [397 U.S. 159] on the issue of standing involved in No. 835, National Association of Securities Dealers v. SEC, and No. 843, Investment Company Institute v. Camp, now pending on petitions for writs of certiorari."

complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" (397 U.S. at 153). In other words, this Court in *ADAPSO* concluded that the ultimate test of standing was neither "aggrievement in fact" (as contended by *ADAPSO, id.* at 152) or "legal interest" (as contended by the government) but, rather, was something in between the two: "arguably within the zone of interests."

However, while rejecting "legal interest" as a test of *standing,* the Court ruled that, in order *to obtain relief* on the basis of an alleged violation of a statute, the plaintiff must establish that it has a "legal interest" which merits protection from such a violation (397 U.S. at 153, 158). The Court also indicated that the question of the existence of such a "legal interest" was independent of the question whether a statutory violation had in fact occurred. *Ibid.* In short, far from rendering irrelevant the issue of the plaintiff's legal interest in the enforcement of the statute involved, the Court simply determined that legal interest is an inquiry addressed "to the merits" rather than to standing. *Ibid.*[13]

In the instant case, which was decided by the court of appeals before this Court's opinion in *ADAPSO,* Judge Burger's majority concurring opinion stated

[13] Specifically, the Court stated that the merits involve two questions: (1) "[w]hether anything in the [relevant statutes] gives petitioners a 'legal interest' that protects them against violations of those [statutes]" and (2) "whether the actions of [the Government officials] did in fact violate [those statutes]." 397 U.S. at 158.

that he was unable to set aside his "grave doubts" as to petitioners' "standing to institute and maintain these suits" (App. 309). He discussed petitioners' standing in terms of the "legal interest" test, and concluded (App. 307–308):

> [Petitioners] here pursue their associational livelihood in a securities marketing industry which thrives on competition in the quest for the investment dollar. The entry of the national bank commingled investment accounts into this competition admittedly adds a whole new category of competitors but it is fundamentally not different from the situation which arises, for example, when "gas stations" sell candy bars, soft drinks and other staples for which travellers have need. Nevertheless, before [petitioners] may sue to prevent bank competition which affects their private financial interest, they must establish that the Glass-Steagall Act contemplated that they were to be protected from this competition in their pursuits. Even assuming that the competing activity of the Appellant Bank may be otherwise violative of a provision of the Act. *I can find no indication that the Act intended to afford protection to securities dealers generally.* My position therefore is one of reservation amounting to virtual disbelief in any standing in [petitioners]. [Emphasis added.]

The same opinion also concluded (App. 305; emphasis added):

> * * * the Glass-Steagall Act does not contain the familiar provisions which constitute an aid to standing in terms of allowing a "person ag-

> grieved" to challenge administrative decisions or promulgations made pursuant to the Act. Nor can [petitioners] validly assert any "license, grant, or recognized property interest" entitling them to standing. *It is equally clear that giving even the broadest reading of the legislative history embellishing the Act will not support the conclusion that Congress meant to bestow upon [petitioners] any protection from competitive injury.* * * *

Judge Bazelon's separate opinion agreed that "the Glass-Steagall Act was not intended by Congress to protect mutual funds from competition from banks, so they do not have standing as intended beneficiaries; and the Act contains no aggrieved party provision." (App. 287).[16]

We submit that the foregoing conclusions as to the interests protected or regulated by the Glass-Steagall Act were sound. Thus, petitioners lack standing to challenge the managing agency investment accounts by national banks, for the interest petitioners assert is not even "arguably within the zone of interest to be protected or regulated" by the Glass-Steagall Act or any other relevant statute. *ADAPSO,* 397 U.S. at 153. In any event, we submit that, as the majority concurring opinion below concluded, petitioners have no "legal interest" which protects them from the statu-

[16] Both Judge Burger's and Judge Bazelon's opinions concluded, for different reasons, that petitioners had standing. (App. 287, 294, 309). However, we show below (pp. 24, *ff.*), this Court's subsequent decision in ADAPSO precludes the grant of standing or of substantive relief on the basis of those reasons.

tory violations which they allege.[17] Consequently, under this Court's decision in *ADAPSO,* petitioners are not entitled to obtain relief on the basis of those statutory violations.

1. Petitioners seek to invalidate a regulation of the Comptroller and action by him which imposes no restriction, burden or duty upon them. Petitioners' sole basis for seeking judicial relief is their fear that, if the Comptroller's action [18] is allowed to stand, prospective customers of mutual funds (who cannot afford the same financial services from banks now enjoyed by large individual managing agency accounts) may instead invest in the bank's fund. But petitioners' wish to be free from this new competition, while understandable, is not a sufficient basis for obtaining judicial relief. As the majority concurring opinion

[17] In our brief in opposition (p. 2, fn. 1), we reserved the right to urge, as an alternative basis for affirmance, that petitioners lack standing to sue. Since our standing argument encompassed the "legal interest" test, which *ADAPSO* removed to the merits, our brief in opposition necessarily preserved the legal interest issue as well.

[18] Although petitioners purport to challenge portions of the Comptroller's regulation (12 C.F.R. 9.18) relating to commingled funds (App. 9), the commingled managing agency account of First National City Bank attacked by the complaint does not comply in full with that regulation and was granted a specific exemption by the Comptroller (App. 201–205). As already noted (*supra*, pp. 6–8, 13–14), this exemption permitted compliance with the securities laws. Without such compliance there could be no issuance of securities and thus no questions arising under the Glass-Steagall Act—the statute petitioners allege to be violated. Indeed, Judge Bazelon suggested that since the alleged illegality arises from an express exemption from the regulation, there is "* * * no need to review the provisions of Regulation 9 as it was originally promulgated." (App. 268).

and Judge Bazelon's opinion both noted (App. 287, 305), there is no "person aggrieved" provision in the governing statutes. Moreover, as the majority concurring opinion also recognized, petitioners cannot validly assert any "license, grant, or recognized property interest" (App. 305).

Thus, in order to establish a protected zone of interest, petitioners must show that Congress, in the Glass-Steagall Act or other relevant statutes, intended directly or indirectly to protect mutual funds from competition by national banks. See *ADAPSO,* 397 U.S. at 153-155, 158. See also *Hardin* v. *Kentucky Utilities Co.,* 390 U.S. 1, 5–7. Similarly, petitioners must show, in the statutory scheme, a legal interest which protects them against the statutory violations which they allege.[19] Petitioners can make no such showing.

2. The substantial increase in bank insolvencies after 1924 and other unsound banking conditions contributed substantially to the economic breakdown of 1929. Beginning with Senate Resolution 71, 71st Cong., 2d Sess. (1929), Congress sought to find means of providing "for a more effective operation of the national and Federal reserve banking systems of the country * * *." The Glass-Steagall Act of 1933, 48 Stat. 162, was enacted to correct the banking "evils which reached a peak of danger in 1929 and abuses

[19] This Court in *ADAPSO* defined "legal interest" by quoting its statement in *Tennessee Power Co.* v. *TVA*, 306 U.S. 118,-137–138, that a legal right was "one of property, one arising out of contract, * * * or one founded upon a statute which confers a privilege." 397 U.S. at 153.

which have gradually grown up within the banking system itself"; it was designed to "correct manifest immediate abuses, and to bring our banking system back into a stronger condition." Sen. Rep. No. 77, 73d Cong., 1st Sess., p. 2 (1933).

Generally speaking, the Glass-Steagall Act erected safeguards against a number of banking abuses, strengthened the hands of the bank supervisory agencies, increased the controls over the volume and use of bank credit, and provided for the insurance of bank deposits throughout the country. As particularly relevant here, several sections of the Act dealt with abuses resulting from the intermingling of the commercial and savings bank business with the underwriting and flotation of security issues and from the use of "securities affiliates"—organizations either owned by or under common control with banks, and engaged in the investment and underwriting business (Section 20).[20]

[20] These securities affiliates were organized because of the common law prohibition against the investment by a bank of its own funds in common stocks, and were designed to be controlled by the bank with which they were affiliated. Through the medium of bank loans to the affiliate secured by the securities held by the affiliate, or by bank credit to the affiliate, these organizations utilized the money held by the bank to "devote themselves in many cases to perilous underwriting operations, stock speculation, and maintaining a market for the banks' own stock * * *." Sen. Rep. No. 77, 73rd Cong., 1st Sess., p. 10 (1933). The underwriting in which the affiliates engaged was the so-called "firm-commitment" or wholesale underwriting, see 1 Loss, *Securities Regulation*, pp. 159–171 (2d ed.), in which the risk of loss rested on the affiliate. The affiliates undertook, for their own account as principals, operations in the securities market which were highly speculative—by engag-

Specifically, section 20 was designed to require the break-up of the securities affiliates, Section 21 to force the private banks out of either the banking or investment banking fields, and Section 32 to ensure that no person with a financial interest in selling securities could serve in a position where he might influence a bank's purchase of securities for itself or for its customers. See *Board of Governors* v. *Agnew,* 329 U.S. 441, 449. Section 16 was intended to confine the securities dealings of the banks within traditional bounds of agency. See S. Rep. 77, 73d Cong., 1st Sess., pp. 16–18; H. Rep. No. 150, 73d Cong., 1st Sess., p. 204.

As the majority concurring opinion below noted (App. 305), "The thrust of the legislation, and the concern of the drafters, was to protect the banking

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ing in high leverage short-term transactions, by utilizing the bank's money to engage in "market support" operations for dubious stocks and other securities held by them, or simply by making high risk investments. See 1920 Report of the Comptroller of the Currency quoted in Hearings Pursuant to S. Res. 71 before a Subcommittee of the Senate Committee on Banking and Currency, 71st Cong., 3d Sess., pp. 1067–1068.

Congress was also concerned about the existence of the "private bankers," which operated as partnerships and were, in many instances, unregulated by the States or by the Federal government. These houses were not restricted as to the investment of their own funds, and consequently could deal in stocks as well as debt securities. Further, they could operate in competition with commercial banks, accepting deposits and other accounts. Stated otherwise, these private bankers could engage, as partnerships, in all the activities for which commercial bankers were required to utilize investment affiliates, and thus were equally dangerous to the banking system. Indeed, the possibility of conflict of interest was even more direct, since both the banking and sale functions were combined in one organization. See 75 Cong. Rec. 9910–9911 (remarks of Senator Bulkley, May 10, 1932); S. Rep. No. 1455, 73d Cong., 2d Sess., pp. 221–229.

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public through the maintenance of a sound national banking system"; it was "not focused on protecting the investing public, much less the securities industry." Judge Bazelon's opinion likewise noted that: "The intended benficiaries of the banking laws, if that class is narrower than the public, are bank customers * * *" (App. 294). Senator Bulkley, one of the managers of the bill, stated this explicitly during the debates:

> [T]he purpose of this bill does not extend to safeguarding purchasers of securities as such. The purpose of this bill is to improve the operation of the Federal Reserve system and the banks which are members of it. The object of the inhibitions which I am discussing here is not primarily to protect the investing public, although that is a worthy purpose, but our field is to protect the operations of the banking system itself, and to protect the depositors and customers of the banks so that they shall have the service from national and State member banks which they are entitled to expect.

75 Cong. Rec. 9913–9914 (1932).[21]

In particular, Congress discerned that the intermingling of commercial and investment banking, and

[21] See also 75 Cong. Rec. 9914 (May 10, 1932) (remarks of Senator Bulkley) ("* * * the measure as a whole is in all of its fiber intended as a protection for depositors"); 75 Cong. Rec. 9915 (May 10, 1932) (remarks of Senator Glass) ("* * * it is not a safe business for a commercial bank to be engaged in investment banking. They ought to be entirely separate").

the practice of "security affiliates," threatened the maintenance of a sound national banking system by: (a) contributing to bank failures; (b) endangering the safety of bank deposits; (c) leading to conflicts of interests by bankers; (d) inducing the making of unsound bank loans; (e) impairing public confidence in the banking system; and (f) diverting the resources of the commercial banking system to speculative purposes never contemplated by Congress. A detailed account of the problems which led to the enactment of the Act is set forth in Appendix B to this brief.

There was no Congressional objective to protect mutual funds or their investment advisers or underwriters. Indeed, one of the arguments *against* the bill was that it would "throw the issue of securities back into the hands of private bankers little subject to public authority," and give the investment bankers a "monopoly." See 75 Cong. Rec. 10002 (May 11, 1932); 77 Cong. Rec. 3958 (May 22, 1933). Congress was concerned that, when the commercial banks were withdrawn from the investment business, there should remain adequate facilities to serve the needs of that industry. 75 Cong. Rec. 9913 (May 10, 1932) (colloquy between Senator Vandenberg and Senator Bulkley); 77 Cong. Rec. 3955, 3957 (May 22, 1933) (remarks of Rep. Bacon). But nowhere in the extensive legislative history of the Glass-Steagall Act can there be found even a suggestion that one of the Congressional purposes was the protection of those in the securities or invest-

ment field, or the conferring upon them of any legal right to be free from competition."[23]

3. The foregoing review of the legislative purpose of the Glass-Steagall Act shows that petitioners lack standing to challenge the operation of commingled managing agency investment accounts by national banks. The interest sought to be protected by petitioners is not even "arguably within the zone of interests to be protected or regulated" by the Glass-Steagall Act or any other relevant statute, *ADAPSO*, 397 U.S. at 153. If, as Senator Bulkley stated (*supra*, p. 28), the purpose of the legislation was "not primarily to protect the investing public," *a fortiori* it was not to protect members of the securities industry engaged in selling to the public.

In any event, petitioners certainly cannot demonstrate a legal right or interest "* * * founded on a statute which confers a privilege." *ADAPSO, supra*, 397 U.S. at 153, quoting from *Tennessee Power Co.* v. *TVA*, 306 U.S. at 137. Neither the Glass-Steagall Act nor any other relevant statute confers upon mutual funds or the investment business any right to protection against the competition of national banks. Since petitioners have no other basis for claiming a "legal interest" which protects them from the statutory violations which they allege, they are not entitled to obtain judicial relief here.

[23] Indeed, the Congressional attitude toward the investment bankers can only be characterized as one of distaste. For example, in discussing the private investment bankers, Senator Glass pointed out that many of them had "unloaded millions of dollars of worthless investment securities upon the banks of this country * * *." 77 Cong. Rec. 4179 (May 25, 1933).

The court below agreed with our analysis of the legislative purpose of the Glass-Steagall Act. The majority concurring opinion, however, resolved its doubts against standing in favor of petitioners because of "the need for judicial examination of the important questions raised" (App. 309).[23] This Court's decision in *ADAPSO,* however, makes it clear that the importance of the questions raised cannot confer standing upon a plaintiff, or permit a plaintiff to

[23] As a practical matter, Congressional examination of the questions presented would seem to diminish the need for judicial examination. Congress has previously considered, and currently has under review, the question of national bank operations of commingled managing agency investment accounts. See S. 2224, 91st Cong., 1st Sess.; 115 Cong. Rec. 13700 (May 26, 1969); H.R. 17333, 91st Cong., 2d Sess.; H.R. 6778, 91st Cong., 1st Sess.; 115 Cong. Rec. H10554, H10559 (Daily ed. Nov. 5, 1969). See also Hearings on Bank and Insurance Company Collective Investment Funds and Accounts, Investment Company Act Amendment of 1967, H.R. 14742 before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (1968); Hearings on Amendment No. 438 to S. 1659 before the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. (1967); Hearings on S. 2704 before a Subcomm. of the Senate Comm. on Banking and Currency, 89th Cong., 2d Sess. 582 (1966); Hearings on H.R. 8499 and H.R. 9410 before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 88th Cong., 2d Sess. 49 (1964). See *Arnold Tours, Inc.* v. *Camp*, C.A. 1, No. 7192, decided June 1, 1970, on remand Slip Opin., p. 4, fn. 4 (Aldrich, Ch. J.): "* * * the fact that Congress is considering the question * * * might suggest an additional reason for our ruling against the plaintiffs. Then, if we have misunderstood the intent of Congress, it may correct us."

obtain relief on the basis of an alleged statutory violation if plaintiff cannot establish that it has a "legal interest" in protecting him from such a violation.[24]

II

THE OPERATION OF A COMMINGLED MANAGING AGENCY INVESTMENT ACCOUNT IS CONSISTENT WITH THE PROHIBITIONS OF THE GLASS-STEAGALL ACT AGAINST BANK INVOLVEMENT IN THE SECURITIES BUSINESS, BECAUSE PARTICIPATING INTERESTS IN THE ACCOUNT ARE NOT "SECURITIES" WITHIN THE MEANING OF THAT ACT.

Petitioners contend that operation of the Account violates Sections 16, 20, 21 and 32 of the Glass-Steagall Act, 12 U.S.C. 24, 377, 378 and 78, which limit banks to purchasing and selling "securities" only for the account of customers, and which prohibit direct or indirect affiliations between banks and issuers, underwriters, sellers or distributors of "securities". Petitioners' case is premised almost entirely on the argument that the "units of participation," represented by the certificates which the Bank gives to participants, are "securities" under the Glass-Steagall Act.[25] For the reasons set forth below, we believe that

[24] Judge Bazelon's opinion concluded that it "is fortuitous that there is no aid to standing for these plaintiffs," and that the "absence of a statutory aid to standing in this case is adventitious and I would grant appellants standing to assert the public interest without it" (App. 287, 294). Since, however—as Judge Bazelon himself recognized—Congress indicated the interests it intended to protect by the passage of the Glass-Steagall Act, the absence of a congressionally established zone of interest or "legal interest" may not—consistent with this Court's decision in *ADAPSO*—be ignored as "adventitious" or "fortuitous."

[25] Petitioners devote relatively little space in their brief, and seem almost to have abandoned, their contention below that the

petitioner has attempted here to impose on the Glass-Steagall Act a definition which belongs peculiarly to the securities regulation statutes, and that the issuance of interests in the Account does not constitute dealing

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commingled managing agency account is not authorized by 12 U.S.C. 92a, which permits national banks to engage in fiduciary activities, on the ground that operation of the Account is not a fiduciary activity (Pet. Br.). In any event, the contention is not persuasive. The Comptroller's regulations require that a bank operating a collective investment fund maintain a written plan stating " * * * the manner in which the fund is to be operated, including provisions relating to the investment powers of the bank with respect to the fund * * *" 12 C.F.R. 9.18(b)(1). The Comptroller examines all banks operating collective investment funds to assure " * * * the protection of the interests of the beneficiaries and other parties at interest * * *", and, for a breach of its fiduciary duty to follow its plan, all the resources of the bank can be reached in a proper case. Hearings on Collective Investment Funds before the Subcommittee on Finance of the House Interstate and Foreign Commerce Committe, 88th Cong., 2d Sess., p. 78 (1964). All partici- that fidciary safegards have not "* * * been supplanted, insofar as funds registered under the Investment Com- ~~planted, insofar as funds registered under the Investment Com-~~ pany Act are concerned, by the obligation to adhere to the terms of the fund's prospectus." Pet. Br. p. 44. Thus the Bank is acting in a "fiduciary capacity" within the meaning of 12 U.S.C. 92a. See *Brown* v. *Christman*, 126 F.2d 625(C.A.D.C.); Restatement of Agency (Second), §§ 13, 14B and comment a; 1 Scott, *Trusts* (3d ed.) § 8.

This conclusion is not undermined, as petitioners contend (Br. 53–55), because the bank lacks in practice discretion to invest the customer's funds in any investment other than the Account. Such lack of discretion may also be true of a bank's individual managing agency account, depending upon the instructions given by the principal, but that does not alter the fiduciary nature of such an account. Moreover, since 12 U.S.C. 92a provides that national banks may act as trustee, executor, administrator, registrar, assignee, receiver "or in any other fiduciary capacity" in which competitive corporations are permitted to act, there is no merit

parts in the account continue to receive these protections, to

in securities within the meaning of the Glass-Steagall Act.[26]

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in petitioners' contention (Br. pp. 53–55) that the bank's commingled investment account is not a fiduciary activity because it lacks "personal trust concepts." The Comptroller has not, as petitioners assert, equated the terms "fiduciary" and "trustee" but instead has by regulation defined "fiduciary" as meaning "* * * a bank undertaking to act alone or jointly with others primarily for the benefit of another in all matters connected with its undertaking and includes trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, managing agent and any other similar capacity." 12 C.F.R. 9.1(b). The testimony of Comptroller Saxon and Mr. Reese Harris of Manufacturers Hanover Trust Company, relied upon by petitioners (Br. 53–54), did not concern what was or was not a fiduciary relationship, but rather was directed to the characteristics which made a commingled trust account established in accordance with 12 C.F.R. 9.18(a)(1) of the Comptroller's regulation (as promulgated in 1963, 28 F.R. 3311) exempt from registration as an investment company under the Investment Company Act of 1940. Moreover, there is no question but that the activity under consideration here is open to competing state banks under New York law, as required by 12 U.S.C. 92a. New York Banking Law, § 100–c; *Brooklyn Trust Co.* v. *Corwin*, 5 F.Supp. 287, 289 (E.D. N.Y.). Indeed, subsequent to the decision below in this case, the New York State Banking Department formally approved the commingling of managing agency accounts in New York (App. 271). Therefore, we believe that no serious question can be raised concerning a violation of 12 U.S.C. 92a.

[26] Since, as will be shown below, the units of participation are not "securities" within the meaning of the Glass-Steagall Act, the merits of this case can be resolved without considering the meaning of such terms as "issue" or "underwrite" as used in that Act.

A. THE DEFINITION OF "SECURITIES" IN THE SECURITIES STATUTES IS INAPPLICABLE TO THE BANKING LAWS

The issuance of the certificates that petitioners now call "securities" is not an inherent aspect of a bank's operation of a collective managing agency account. Indeed, the Comptroller's regulations prohibit the issuance of such certificates, 12 C.F.R. 9.18(b)(13), and the only reason for their existence—and the Comptroller's special permission therefore—is the Commission's determination that the Account is subject to the Investment Company Act of 1940 and the Securities Act of 1933. The certificates (which are not transferable) merely indicate the amount of undivided interest each participant has in the commingled account (App. 134). The fact that the Commission requires, for its own regulatory purposes, the issuance and registration of these certificates is irrelevant to the question whether the operation of the Account is equivalent to doing a prohibited "securities" business within the meaning of the Glass-Steagall Act.[27]

Indeed, petitioners argument is fundamentally circular. Although, as we show below (pp. 37–44), the

[27] Petitioners' reliance upon statements by Commission officials, such as the testimony of Chairman Cohen (Pet. Br., p. 26, fn. 32), that the bank's unit of participation is a "security" is misplaced. These statements refer to the securities laws and not to the Glass-Steagall Act.

bank activity of providing investment advice is entirely consistent with the purposes of the Glass-Steagall Act, petitioners contend that the addition of the wholly separate requirements of the securities laws (resulting in the issuance of "securities") creates a situation in which this activity is prohibited by the language of that Act. But for the definitions contained in the securities laws, however, there would be nothing that could possibly be a "security" under the Glass-Steagall Act. The application of the securities laws cannot make a commingled managing agency account illegal under the banking laws.

In any event, the extremely broad definition of the term "securities" in the Securities Act of 1933 should not be carried over to the Glass-Steagall Act. Judge Bazelon's analysis is compelling (App. 274):

> The words security and underwriter in the Securities Act of 1933 are terms of art with a high gloss. Their expansive definitions under the Securities Act cannot be imported wholesale into the Glass-Steagall Act when the two statutes serve different purposes, in different contexts of risk to the public. The securities laws are intended to protect investors primarily through disclosure requirements. Their terms have been interpreted broadly to afford their protection to purchasers of all manner of investment interests, wherever it is needed. The Glass-Steagall Act, by contrast, was enacted to protect bank depositors and the banking system from the risk of insolvency incident to widespread investment of banks' assets in speculative securities during the twenties. * * *

Petitioners' contention that the term "securities" has the same meaning in Glass-Steagall as in the federal securities laws not only ignores the differing legislative objectives of these two enactments (see *supra*, pp. 25–28, 36), but would go far beyond outlawing commingled managing agency accounts. The definition of "security" in the Securities Act of 1933 and the Securities Exchange Act of 1934, 15 U.S.C. 77b, 78c(a)(10), would cover many banking transactions, such as the issuance of a savings and loan association passbook (*Tcherepnin* v. *Knight*, 389 U.S. 332) and the sale by a bank of a loan participation (*Lehigh Valley Trust Co.* v. *Central National Bank of Jacksonville*, 409 F. 2d 989 (C.A. 5)). Since these interests have been held to be "securities" under the federal securities laws, under petitioners' theory they could not be issued by a banking institution because of the proscriptions of the Glass-Steagall Act. Congress did not intend such a result to flow from the enactment of the latter statute.

B. THE GLASS-STEAGALL ACT WAS NOT INTENDED TO PREVENT BANKS FROM OFFERING THEIR FIDUCIARY INVESTMENT ADVISORY SERVICES TO A WIDER RANGE OF CUSTOMERS

As we have shown above, the issuance of certificates representing participating interests in the Account is not dealing in "securities" within the meaning of the Glass-Steagall Act merely because the certificates are technically securities under the securities laws. We now show that the operation of the Account is consistent with the purposes of that Act.

The legislative history of the Glass-Steagall Banking Act of 1933, some of which we have summarized

in Appendix B to this brief, demonstrates that Congress was concerned in that Act with the problems inherent in the intermingling of commercial and investment banking. In the securities provisions of the Glass-Steagall Act, as noted above, *supra,* pp. 25–28, Congress attempted to safeguard commercial banks from making excessively speculative financial commitments, which were fraught with potential conflict of interest problems, by prohibiting banks from purchasing, issuing, and underwriting many types of securities. The Act was especially concerned with the conflicts of interest inherent in the relationship between commercial banks and their securities affiliates, which were organizations established to circumvent prior laws prohibiting commercial banks from entering the investment banking business, and which used the bank's funds for "perilous underwriting operations, stock speculation, and maintaining a market for the bank's own stock * * *" Sen. Rep. No. 77, 73d Cong., 1st Sess. p. 10 (1933).[28]

The Glass-Steagall Act was in no way intended to limit the traditional function of banks to manage the investments of their customers in a fiduciary capacity.[29] The dangers of excessive speculative risk and the

[28] See our brief in No. 59, *NASD* v. *Securities and Exchange Commission*, pp. 18–19.

[29] Petitioners contend (Pet. Br. p. 52) that Congress would not have regarded the Bank's commingling of managing agency accounts as a fiduciary activity under 12 U.S.C. 92a because, in Section 584 of the Internal Revenue Code, Congress exempted from taxation only common trust funds maintained by a bank in its capacity as "trustee, executor, administrator, or guardian." However, the predecessor of Section 584 (Section 169 of the

resultant conflict of interest which Congress intended to prevent when it passed that Act are simply not present when banks manage investment accounts in which the bank's interest is limited to its advisory fee.[30] From the standpoint of the Glass-Steagall Act, it makes no difference whether funds managed by the bank are commingled in order to extend the bank's services to a wider range of customers.

As the majority concurring opinion below pointed out, "[i]n one form or another banks have been holding, managing and investing funds for customers for a long time" (App. 310). For example, at least since 1934, when the Federal Reserve Board and the Comptroller of the Currency specifically approved the practice, national banks have acted as managing agents in buying, selling, and holding common stock or other securities for the account of individual bank customers pursuant to an agreement making the bank the customer's agent (see p. 4, *supra*). In addition, since 1915 national banks have managed trust accounts containing securities (38 Stat. 262; 1 Fed. Reserve Bull. 43 (1915)), and, since 1937, have been permitted to commingle the assets of such accounts and to administer them in a common trust fund (see p. 4,

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Revenue Act of 1936) was enacted in 1936 to meet the specific problems arising from the decision in *Brooklyn Trust Co.* v. *Commissioner*, 80 F. 2d 865 (C.A. 2), certiorari denied, 298 U.S. 659 (1936), and the treatment of managing agency funds was not expressly considered (see Saxon and Miller, *Common Trust Funds*, 53 Geo. L.J. 994, 1003–1009 (1965)).

[30] The Comptroller prohibits a bank administering a collective investment fund from having any direct interest in such a fund (12 C.F.R. 9.18(b)(8)(i)).

supra).[31] Similarly, since 1955 banks have been permitted to administer commingled pension, profit share, or stock bonus plan funds—some of which have been held by banks in the capacity of managing agent. 20 F.R. 3305 (1955). Petitioners do not, and cannot, object to the legality of these longstanding bank services.

Nor is there anything novel in the concept or in the practical operation of a commingled managing agency investment account. Such an account is designed simply to make available to the smaller investor (in this case one with $10,000 to invest) the benefit, previously available only to large investors through individual managing agency accounts, of having their investments managed by a bank trust department.[32] As Judge Bazelon pointed out below, the fact that the bank's services are now available to a wider range of customers in no way alters the relationship be-

[31] In fact, such funds were approved as early as 1927 by the Comptroller and the Federal Reserve Board. See the description of the Security National Bank Bond Investment Trust in Saxon and Miller, *Common Trust Funds*, 53 Geo. L.J. 994, 997 (1965).

[32] Petitioners devote considerable attention (Br. pp. 49–55) to refuting a contention never made by any party in this litigation—that the commingled managing account is "immune" from the Glass-Steagall Act "simply because it is operated by the Bank's trust department." The Comptroller's position has always been that the operation of the commingled managing account is within the fiduciary powers granted national banks by 12 U.S.C. 92a and consistent with the prohibitions of the Glass-Steagall Act against bank investment in the securities business; the Comptroller does not claim a "license to violate the provisions of substantive law."

tween investment advisory services and the Glass-Steagall Act.[33]

> The establishment of a bank-sponsored collective investment fund is not barred by the banking laws. A commingled managing agency account is a descendant of the individual managing agency account and the common trust fund, fitting within the traditional authority of banks to manage other people's money in a fiduciary capacity sanctioned by the Federal Reserve Act. * * * The sale of an investment service to a potentially large number of customers gives rise to obligations under the securities laws, but these do not convert otherwise lawful transactions for the account of customers into prohibited securities dealings within the meaning of the Glass-Steagall Act. [App. 278.]

In support of his conclusion that the Account presents no potential problems which are not present "in

[33] Petitioners assert (Pet. Br. 22, fn. 28) that "The prohibitions of the Glass-Steagall Act were understood at the time of the Act's passage to bar relationships between a bank and an investment fund of the type authorized by the Comptroller's Regulation." However, the Irving Investor's Fund C described in petitioners' brief (p. 22, fn. 28) was not comparable to the commingled account now operated by the Bank, so that the experience of the Irving Trust Company does not support petitioners' contention concerning the Glass-Steagall Act. Irving Fund C was a separate corporate entity, which issued shares directly to the public. There does not appear to have been a fiduciary relationship between the shareholders and the Irving Trust Company, as is required for admission to the Account. More comparable to the Bank's present commingled account was the Brooklyn Trust Company's Composite Fund, Series A, which continued to be operated by Brooklyn Trust Company after the passage of the Glass-Steagall Act. See *Saxon and Miller*, *supra*, n. 31, at 999–1000, 1003–1009.

all bank investments in securities for the account of customers" (App. 275), Judge Bazelon analyzed in detail the specific problems at which Sections 16, 20, 21, and 32 of the Glass-Steagall Act were aimed. He concluded, for example, that Sections 16 and 21, which essentially prohibit banks from issuing or underwriting securities, were addressed to three problems—risky investments of bank assets, the making of unsound loans to shore up companies in which the bank had invested, and the incentive to "steer" customers into investing what the bank has to sell.

With respect to the first of these problems, risky investments of bank assets, Judge Bazelon correctly pointed out that it "does not arise here, because the securities in the fund are purchased for the account of the customer, not the bank" (App. 275). With respect to the second danger, shoring up bad investments with unsound loans, Judge Bazelon pointed out that the risk is significantly reduced by virtue of the fact that the securities are not held for the Bank's own account, and, again, that whatever risk remains is no different from that always present in bank-managed investment accounts. As for the third problem, the bank's incentive to steer customers into investing in the Account, Judge Bazelon noted that "The Bank's interest in earning a regulated fiduciary charge bears little resemblance to its interest in earning an indeterminate distributing profit from securities which it owns or underwrites, and the interest forbidden by § 16 is the latter" (App. 275–276). Similarly, with respect to Sections 20 and 32 of the Act, which prohibit various interlocks and affiliations

of personnel between banks and securities dealers, Judge Bazelon noted that "The clear purpose of §§ 20 and 32 is to prevent banks from entering into prohibited forms of securities dealing by the back door. We have held that the Bank may enter the business of operating the Account by the front door" (App. 277).

Petitioners' argument ignores the critical consideration, which Judge Bazelon persuasively developed, that the potential risks and conflicts of interest here are no greater than in the case of any other fiduciary account. Petitioners argue (Br. 34–37), for example, that the Bank will be under pressure to merchandise the fund "aggressively" because its fee depends upon the size of the Account;[34] that "in order to maintain the fund's value," the Bank might "make loans needed by companies whose stock is held" by the Account; that a poor performance by the Account might undermine public confidence in the Bank; and even that the Bank might change the prime rate of

[34] To support this contention, petitioners cite (Br. 34) the statement of former Chairman Cary of the Commission that the transfer of participations in the Account involved a "public offering." Chairman Cary obviously was referring not to the merchandising practice of the banks, but to the phrase "offered to the public" as used in Section 4 of the Securities Act of 1933, 15 U.S.C. 77d, on the basis of which the Commission asserted jurisdiction over the Account. The Comptroller's regulation prohibits advertising a collective investment account, except in connection with the Bank's general fiduciary services, and limits the Bank's publicizing of its investment record (12 C.F.R. 9.18(b)(5)(iii) and (iv)). Moreover, as Judge Bazelon's opinion noted, "* * * the merchandising problem is more relevant to the question of the proper exercise of fiduciary powers than to entry into the securities business within the meaning of the Glass-Steagall Act." (App. 275).

interest in order to affect the value of the securities held by the Account. Petitioners do not attempt to explain how the potential evils they envision are distinguishable from those present, for example, in the ordinary trust account.[35] Petitioners argument thus rests upon a fundamental misconception of the function of the Glass-Steagall Act.[36]

III

AUTHORIZATION OF COMMINGLED MANAGING AGENCY ACCOUNTS WAS A PROPER EXERCISE OF THE COMPTROLLER'S REGULATORY POWERS

As we have shown, operation of commingled managing agency accounts is not inconsistent with the purposes of the applicable banking statutes. Once this has been determined, the complex questions about the appropriateness of these accounts in general and the

[35] Petitioners also contend that the Bank might make unsound loans directly to the Account. The Comptroller's regulations, however, foreclose such a possibility by prohibiting a bank that administers a commingled fiduciary account from having "any interest in such fund other than in its fiduciary capacity * * *" 12 C.F.R. 9.18(b)(8)(i). In addition, the Account's prospectus states that it will not borrow money (App. 148).

[36] Petitioners also discern a conflict between the interests of the Account and those of the Bank in the fact that the Account "represents a potential for bringing under bank control substantial amounts of voting securities over and above the vast amounts now held in bank trust departments" (Br. 38–39). We do not understand, nor have petitioners explained, how such a "potential" bears upon a conflict of interest between the Account and the Bank, such as concerned Congress in enacting the Glass-Steagall Act. Bank control of voting shares would, instead, seem to be a matter of concern for the antitrust laws. See *United States* v. *Cleveland Trust Co.*, N.D. Ohio, Civil Action No. C70.301 (complaint filed March 26, 1970).

circumstances and conditions under which they should be permitted are questions for the regulatory agencies charged with administration of the banking laws. Courts should not interfere with the expert judgment of these agencies when they act within their statutory authority. *Unemployment Compensation Commission* v. *Aragon,* 329 U.S. 143, 153–154; *Federal Security Administrator* v. *Quaker Oats Co.,* 318 U.S. 218, 233; *Inland Waterways Corp.* v. *Young,* 309 U.S. 517, 524. Furthermore, the Comptroller's interpretation of the statute which he administers is entitled to great weight. *National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 111, 131.

Recognizing that the Comptroller, the Federal Reserve Board, and the Commission,[37] after careful and

[37] Petitioners suggest several times that the Comptroller's regulations are contrary to previous rulings of the Federal Reserve Board (Br. pp. 9, 29, 32, fn. 38), and that therefore the regulatory agencies involved are in "disarray" over the lawfulness of the fund (Br. 10). In fact, the Federal Reserve Board has ruled only once on the legality of commingled managing agency accounts, in connection with this case, and that ruling supports the Comptroller's regulation. 12 C.F.R. 218.111. The Board has issued several opinions which apply Section 32 of the Glass-Steagall Act to prohibit interlocking relations between banks and certain *outside*, non-bank enterprises, which the Board found to be "double entities" (see Pet. Br. p. 32, fn. 38), but those opinions have no relevance here, because in this case the Board found that the Bank and the Account were a "single entity," 12 C.F.R. 218.111. The Board has similarly concluded that the single-entity theory applies in the case of the functionally similar common trust funds and various pooled funds, including employee pension or profit-sharing trusts. See Hearings on S. 2704, before a Subcommittee of the Senate Committee on Banking and Currency, 89th Cong., 2d Sess., p. 586 (1966).

extensive consideration, have unanimously approved the establishment of commingled managing agency accounts,[38] Judge Burger concluded as follows (App. 310):

> Here the Comptroller of the Currency, after study, has decided that the commingled managing agency account is a function which is authorized by law for banks and is in the public

[38] Congress has also had occasion to consider this matter. S. 2224, passed by the Senate on May 26, 1969, specifically authorizes operation of the commingled managing agency account here involved, while H.R. 6778, passed by the House of Representatives on November 5, 1969, apparently specifically prohibits the operation of such an account.

There is no support for petitioner's statement (Pet. Br., p. 27) that "the Senate and House Committees on Banking and Currency are also of the view that a bank open-end investment fund like that of Citibank's is engaged in the 'underwriting, distribution and sales of securities' for the purposes of the banking and securities laws". The Senate Committee report cited for this proposition does recognize that the units of participation are "securities" within the meaning of the securities laws. As to the banking laws, however, the Senate report stated that the district court's decision in this case "held that the Glass-Steagall Act prohibited banks from selling interests in collective investment funds to the general public." The committee characterized the district court's decision as reviving the "prior unfortunate confusion" and creating "an unwarranted comparative disparity" between the ability of banks and of mutual funds to offer investment advice to the public. S. Rep. No. 91-184, 91st Cong., 1st Sess., 11 (1969). The House Committee report cited by petitioners included "prevailing views" and "additional views". The statement concerning the Glass-Steagall Act relied upon by petitioners is found in the additional views which were not adopted by a majority of the Committee. Thus neither the Senate nor the House Banking and Currency Committee has expressed any view in connection with its consideration of current legislation concerning the applicability of the Glass-Steagall Act to a commingled fund such as that of the Bank.

> interest; the Securities and Exchange Commission and the Federal Reserve Board have approved. Other state and federal regulatory bodies are in accord. The regulatory bodies charged by Congress with these large responsibilities have construed the grant of power and with their accumulated expert experience have decided these issues. Their decisions are entitled to substantial deference and on this record I see no basis for disturbing their conclusions.

Judge Burger's conclusion that the Comptroller's regulations and his authorization of the Bank's operation of the Account are appropriate exercises of that official's supervisory power over the fiduciary activities of banks under Section 92a [39] of Title 12 reflects the application of the settled principles of administrative law noted above. There is no occasion for this Court to disturb those determinations of the Comptroller.

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[39] Section 92a(j) of Title 12 authorizes the Comptroller to "promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein."

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the court of appeals should be affirmed.

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JULY 1970.

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

1. Sections 16, 20, 21 and 32 of the Glass-Steagall Banking Act of 1933, 48 Stat. 184–85, 188–89, 194, as amended, 49 Stat. 707, 709 (1935), 12 U.S.C. §§ 24, 377, 378, 78 (1964) provide in pertinent part:

> SEC. 16. Paragraph "Seventh" of section 5136 of the Revised Statutes, as amended (U.S.C. title 12, sec. 24; Supp. vi, title 12, sec. 24), is amended to read as follows:
>
> "Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discontinuing and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this chapter. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock: *Provided,* That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe. In no event shall the total amount of the investment securities of any one obligor or maker, held by the asso-

ciation for its own account, exceed at any time 10 per centum of its capital stock actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund, except that this limitation shall not require any association to dispose of any securities lawfully held by it on August 23, 1935. As used in this section the term "investment securities" shall mean marketable obligations, evidencing indebtedness of any person, copartnership, association, or corporation in the form of bonds, notes and/or debentures commonly known as investment securities under such further definition of the term "investment securities" as may by regulation be prescribed by the Comptroller of the Currency. Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by the association for its own account of any shares of stock of any corporation. * * *

SEC. 20. (a) After one year from the date of the enactment of this Act, no member bank shall be affiliated in any manner described in section 2(b) hereof with any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities: * * *.

* * * * *

SEC. 21. (a) After the expiration of one year after June 16, 1933, it shall be unlawful—

(1) For any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon

presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor: *Provided*, That the provisions of this paragraph shall not prohibit national banks or State banks or trust companies (whether or not members of the Federal Reserve System) or other financial institutions or private bankers from dealing in, underwriting, purchasing, and selling investment securities to the extent permitted to national banking associations by the provisions of section 24 of this title: * * *

* * * * *

SEC. 32. No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments.

* * * * *

2. Public Law 87–722, 76 Stat. 668 (1962), 12 U.S.C. 92a (1964) provides in pertinent part:

(a) The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other

corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

* * * * *

(j) * * * The Comptroller of the Currency is authorized and empowered to promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein.

3. Regulation 9 of the Comptroller of the Currency, 12 C.F.R. § 9 (1967), provides in pertinent part:

§ 9.18 Collective investment.

(a) Where not in contravention of local law, funds held by a national bank as fiduciary may be invested collectively:

(1) In a common trust fund maintained by the bank exclusively for the collective investment and reinvestment of monies contributed thereto by the bank in its capacity as executor, administrator, guardian or trustee under a will or deed;

(2) In a fund consisting solely of assets of retirement, pension, profit sharing, stock bonus, or other trusts which are exempt from Federal income taxation under the Internal Revenue Code;

(3) In a common trust fund, maintained by the bank exclusively for the collective investment and reinvestment of monies contributed thereto by the bank in its capacity as managing agent under a managing agency agreement expressly providing that such monies are received by the bank in trust;

(b) Collective investments of funds or other property by national banks under paragraph (a) of this section (referred to in this paragraph as "collective investment funds") shall be administered as follows:

(1) Each collective investment fund shall be established and maintained in accordance with a written plan (referred to herein as the Plan) which shall be approved by a resolution of the bank's board of directors and filed with the Comptroller of the Currency. The Plan shall contain appropriate provisions not inconsistent with the rules and regulations of the Comptroller of the Currency as to the manner in which the fund is to be operated, including provisions relating to the investment powers of the bank with respect to the fund, the allocation of income, profits and losses, the terms and conditions governing the admission or withdrawal of participations in the fund, the auditing of accounts of the bank with respect to the fund, the basis and method of valuing assets in the fund, the minimum frequency for valuation of assets of the fund, the period following each such valuation date during which the valuation may be made, the basis upon which the fund may be terminated, and such other matters as may be necessary to define clearly the rights of participants in the fund: *Provided,* That Plans which have been established in conformance with prior regulations of the Board of Governors of the Federal Reserve System or the Comptroller of the Currency may continue to conform to such regulations rather than the requirements of this paragraph, for a reasonable period. A copy of the Plan shall be available at the principal office of the bank for inspection during all banking hours, and upon request a copy of the Plan shall be furnished, to any person.

(2) Monies held by the bank in its capacity as managing agent shall not be invested in collective investment funds established under the provisions of paragraph (a) (1) or (2) of this section. Property held by the bank in its capacity as trustee of retirement, pension, profit sharing, stock bonus or other trusts

which are exempt from Federal income taxation under the Internal Revenue Code may be invested in collective investment funds established under the provisions of paragraph (a) (1) or (2) of this section, subject to the provisions herein contained pertaining to such funds. Assets of retirement, pension, profit sharing, stock bonus or other trusts which are exempt from Federal income taxation under the Internal Revenue Code and held by the bank, in whatever capacity, may be invested in collective investment funds established under the provisions of paragraph (a)(2) of this section.

(3) All participations in the collective investment fund shall be on the basis of a proportionate interest in all of the assets. In order to determine whether the investment of funds received or held by the bank as fiduciary in a participation in a collective investment fund is proper, the bank may consider the collective investment fund as a whole and shall not, for example, be prohibited from making such investment because any particular asset is non-income producing.

(4) Not less frequently than once during each period of three months a bank administering a collective investment fund shall determine the value of the assets in the fund as of the dates set for the valuation of assets. No participation shall be admitted to or withdrawn from the fund except (i) on the basis of such valuation and (ii) as of such valuation date. No participation shall be admitted to or withdrawn from the fund unless a written request for or notice of intention of taking such action shall have been entered on or before the valuation date in the fiduciary records of the bank and approved in such manner as the board of directors shall prescribe. No such request or notice may be cancelled or countermanded after the valuation date.

(5)(i) A bank administering a collective investment fund shall at least once during each period of 12 months cause an adequate audit to be made of the collective investment fund by auditors responsible only to the board of directors of the bank. In the event such audit is performed by independent public accountants, the reasonable expenses of such audit may be charged to the collective investment fund.

(ii) A bank administering a collective investment fund shall at least once during each period of 12 months prepare a financial report of the fund which shall be filed with the Comptroller of the Currency. This report, based upon the above audit, shall contain a list of the investments in the fund showing the current market value of each investment, a statement for the period since the last report showing purchases, sales and any other investment changes, income and disbursements, and an appropriate notation as to any investment in default.

(iii) The financial report may include a description of the fund's value on previous dates as well as its income and disbursements during previous accounting periods. The report shall make no reference to the performance of funds other than those administered by the bank, and no predictions or representations as to future results.

(iv) A copy of the financial report shall be furnished, or notice shall be given that a copy of such report is available and will be furnished without charge upon request, to each person to whom a regular periodic accounting would ordinarily be rendered with respect to each participating account. The report, in such summarized form as prescribed by the Comptroller of the Currency, shall be published in a newspaper of general circulation in the place where the principal office of the bank is located. In addition,

a full report shall be furnished upon request to any person, and the fact of the availability of such material may be given publicity solely in connection with the promotion of the fiduciary services of the bank. Except as herein provided, the bank shall not advertise or publicize its collective investment fund(s). The cost of printing, publication and distribution of the report shall be borne by the bank.

(6) When participations are withdrawn from a collective investment fund, distributions may be made in cash or ratably in kind, or partly in cash and partly in kind, provided that all distributions as of any one valuation date shall be made on the same basis.

(7) If for any reason an investment is withdrawn in kind from a collective investment fund for the benefit of all participants in the fund at the time of such withdrawal and such investment is not distributed ratably in kind, it shall be segregated and administered or realized upon for the benefit ratably of all participants in the collective investment fund at the time of withdrawal.

(8) (i) A bank administering a collective investment fund shall not (*a*) have any interest in such fund other than in its fiduciary capacity (funds held by a bank as fiduciary as described under paragraph (a) (1) or (2) of this section for its own employees may be invested in such a fund) or (*b*) make any loans on the security of a participation in such fund. If because of a creditor relationship or otherwise the bank acquires an interest in a participation in such fund, the participation shall be withdrawn on the first date on which such withdrawal can be effected. However, in no case shall an unsecured advance to an account holding a participation until the time of the next withdrawal be deemed to constitute the acquisition of an interest by the bank.

(ii) The bank may purchase for its own account from a collective investment fund any defaulted mortgage held by such fund, if in the judgment of the board of directors the cost of segregation of such mortgage would be greater than the difference between its market value and its principal amount plus interest and penalty charges due. If the bank elects to so purchase the mortgage it must do so at its market value or at the sum of principal, interest and penalty charges, whichever is greater.

(9) Except in the case of collective investment funds described in paragraph (a)(2) of this section:

(i) No funds or other property shall be invested in a participation in a collective investment fund if as a result of such investment the participant would have an interest aggregating in excess of ten per cent of the then market value of the fund: *Provided,* That in applying this limitation if two or more accounts are created by the same person or persons and as much as one-half of the income or principal of each account is payable or applicable to the use of the same person or persons, such accounts shall be considered as one;

(ii) No investment for a collective investment fund shall be made in stocks, bonds or other obligations of any one person, firm or corporation if as a result of such investment the total amount invested in stocks, bonds or other obligations issued or guaranteed by such person, firm or corporation would aggregate in excess of ten percent of the then market value of the fund: *Provided,* That this limitation shall not apply to investments in direct obligations of the United States or other obligations fully guaranteed by the United States as to principal and interest;

(ii) Any bank administering a collective investment fund shall have the responsibility of maintain-

ing in cash and readily marketable investments such part of the assets of the fund as shall be deemed to be necessary to provide adequately for the needs of participants and to prevent inequities between such participants, and if prior to any admissions to or withdrawals from a fund the bank shall determine that after effecting the admissions and withdrawals which are to be made less than 40 percent of the value of the remaining assets of the collective investment fund would be composed of cash and readily marketable investments, no admissions to or withdrawals from the fund shall be permitted as of the valuation date upon which such determination is made: *Provided,* That ratable distribution upon all participations shall not be so prohibited in any case.

(10) The reasonable expenses incurred in servicing mortgages held by a collective investment fund may be charged against the income account of the fund and paid to servicing agents, including the bank administering the fund.

(11) (i) A bank may (but shall not be required to) transfer up to five percent of the net income derived by a collective investment fund from mortgages held by such fund during any regular accounting period to a reserve account: *Provided,* That no such transfers shall be made which would cause the amount in such account to exceed one percent of the outstanding principal amount of all mortgages held in the fund. The amount of such reserve account, if established, shall be deducted from the assets of the fund in determining the fair market value of the fund for the purposes of admissions and withdrawals.

(ii) At the end of each accounting period, all interest payments which are due but unpaid with respect to mortgages in the fund shall be charged

against such reserve account to the extent available and credited to income distributed to participants. In the event of subsequent recovery of such interest payments by the fund, the reserve account shall be credited with that amount so recovered.

(iii) Notwithstanding anything herein contained to the contrary, Mortgage Investment Funds presently being operated pursuant to the provisions of section 17(d) of prior regulations of the Comptroller of the Currency or the Board of Governors of the Federal Reserve System may continue to be operated in accordance with such prior regulations for a reasonable time. However, after April 5, 1963, no such funds shall be established.

(12) A national bank administering a collective investment fund shall have the exclusive management thereof. The bank may charge a fee for the management of the collective investment fund provided that the fractional part of such fee proportionate to the interest of each participant shall not, when added to any other compensations charged by the bank to the participant, exceed the total amount of compensations which would have been charged to said participant if no assets of said participant had been invested in participations in the fund. The bank shall absorb the costs of establishing or reorganizing a collective investment fund.

(13) No bank administering a collective investment fund shall issue any certificate or other document evidencing a direct or indirect interest in such fund in any form.

(14) No mistake made in good faith and in the exercise of due care in connection with the administration of a collective investment fund shall be deemed to be a violation of this part if promptly after the dis-

covery of the mistake the bank takes whatever action may be practicable in the circumstances to remedy the mistake.

(c) In addition to the investments permitted under paragraph (a) of this section, funds or other property received or held by a national bank as fiduciary may be invested collectively, to the extent not prohibited by local law, as follows:

(1) In shares of a mutual trust investment company, organized and operated pursuant to a statute that specifically authorizes the organization of such companies exclusively for the investment of funds held by corporate fiduciaries, commonly referred to as a "bank fiduciary fund".

(2) In a single real estate loan or a direct obligation of the United States, or an obligation fully guaranteed by the United States, if the bank owns no participation in the loan or obligation and has no interest therein except in its capacity as fiduciary.

(3) In a common trust fund maintained by the bank for the collective investment of cash balances received or held by a bank in its capacity as trustee, executor, administrator or guardian, which the bank considers to be individually too small to be invested separately to advantage, and the total investment in which on the part of any one account does not exceed $10,000: *Provided,* That in applying this limitation if two or more accounts are created by the same person or persons and as much as one-half of the income or principal of each account is payable or applicable to the use of the same person or persons, such account shall be considered as one: *And provided,* That no fund shall be established or operated under this subparagraph for the purpose of avoiding the provisions of paragraph (b) of this section.

(4) In any investment specifically authorized by court order or authorized by the instrument creating the fiduciary relationship: *Provided,* That such investment is not made under this paragraph for the purpose of avoiding the provisions of paragraph (b) of this section.

(5) In such other manner as shall be approved in writing by the Comptroller of the Currency.

APPENDIX B

SUMMARY OF THE PROBLEMS WHICH LED TO THE ENACTMENT OF THE GLASS-STEAGALL BANKING ACT OF 1933

The legislative history of the Glass-Steagall Banking Act of 1933 demonstrates that Congress was concerned that the intermingling of commercial and investment banking and the practices of "security affiliates" threatened the maintenance of a sound national banking system by: (1) contributing to bank failures; (2) endangering the safety of bank deposits; (3) leading to conflicts of interest by bankers; (4) inducing the making of unsound bank loans; (5) impairing public confidence in the banking system; and (6) diverting the resources of the commercial banking system to speculative purposes never contemplated by Congress. The history does not, however, reflect any Congressional intention to prohibit the operation of a trust department by a national bank.

a. In describing the banking conditions which culminated in the economic breakdown of 1929, Senate Report No. 77, 73d Cong., 1st Sess., p. 8, that a "very fruitful cause of bank failures, especially within the past three years, has been the fact that the funds of various institutions have been so extensively 'tied up' in long-term investments." Moreover, the Senate Report continued (*ibid.*), "The growth of the investment portfolio of the bank itself has been greatly emphasized in importance by the organization of allied or affiliated companies under State laws, through which even more extensive advances and in-

vestments in the security market could be made." Senator Glass similarly stated during floor debates that "one of the greatest contributions to the unprecedented disaster which has caused this almost incurable depression was made by these bank affiliates. They sent out their high-pressure salesmen and literally filled the bank portfolios of this country with these investment securities." 75 Cong. Rec. 9887 (May 10, 1932).

b. Congress was also concerned about the losses to bank depositors resulting from investment of bank assets in securities whose value subsequently declined. See Sen. Rep. No. 77, *supra,* pp. 9–10; 75 Cong. Rec. 9905–06 (May 10, 1932) (remarks of Senator Walcott); 77 Cong. Rec. 3924 (May 22, 1933) (remarks of Rep. Green) "I hope this bill will put a stop to this orgy of speculation with depositors' funds throughout the United States and make safe in the future our bank deposits." Congress was also aware that bank depositors suffered great losses on securities which they purchased from security affiliates in reliance upon the relationship between the bank and its affiliate. See 77 Cong. Rec. 4028 (May 23, 1933) (remarks of Rep. Fish).

c. Congress was also very much concerned with the conflicts of interest which bankers were frequently faced with as a result of their intermingling of commercial and investment banking. Banks which acted as issuers or underwriters of securities had a pecuniary interest in selling those securities, which conflicted with their duty to give their customers disinterested investment advice. As Senator Bulkley stated (75 Cong. Rec. 9912, 9915 (May 10, 1932)):

> Obviously, the banker who has nothing to sell his depositors is much better qualified to advise disinterestedly and to regard diligently the safety of depositors than the banker who

> uses the list of depositors in his savings department to distribute circulars concerning the advantages of this, that, or the other investment on which the bank is to receive an originating profit or an underwriting profit or a distribution profit or a trading profit or any combination of such profits.
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> * * * * *
>
> * * * If we want banking service to be strictly banking service, without the expectation of additional profits in selling something to customers, we must keep the banks out of the investment security business.
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> * * * * *
>
> * * * it makes a divided interest in the allegiance of a bank to its customers, and * * * it is not in accord with what we know human nature to be to expect that a bank shall have securities for sale on which it makes a profit and at the same time be competent to advise its customers with respect to their investments. * * * [2b]

Large banks were also placed in a position of conflict of interest by their sales of securities to correspondent banks. Indeed, Congress was deeply disturbed by the pressure which large city banks exerted upon their correspondent banks to purchase such securities, which were frequently unsound. As Senator Glass stated, "It was because of that system of involuntary servitude that the great banks in the money centers choked the portfolios of their correspondent banks from Maine to California with utterly worthless investment securities * * *." 75 Cong. Rec. 9883 (May 10, 1932). See also 75 Cong. Rec. 9906 (May 10, 1932) (remarks of Senator Walcott) ("We have banks

[2b] Senator Glass similarly stated that bank engagement in the investment business was "a vain attempt to fairly serve two masters, and * * * it can not be done." 75 Cong. Rec. 9915 (May 10, 1932).

that have closed their doors because they have overpurchased, as correspondent banks of some of the larger ones, the very securities that the larger banks have forced upon them"); 75 Cong. Rec. 9978 (May 11, 1932) (remarks of Senator Norbeck).

There were also conflicts on "the other side of the picture." As Senator Bulkley stated (75 Cong. Rec. 9911–12, 9914—May 10, 1932):

> * * * Can any banker, imbued with the consciousness that his bond-sales department is, because of lack of securities for sale, losing money and at the same time losing its morale, be a fair and impartial judge as to the necessity and soundness for a new security issue which he knows he can readily distribute through channels which have been expensive to develop but which presently stand ready to absorb the proposed security issue and yield a handsome profit on the transaction?
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> * * * * *
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> * * * If, on the other hand, the business of originating and underwriting investment securities is confined to houses not engaged in deposit banking, than the extent and the desirability of new issues will be subjected to an independent and impartial check. This should tend to restore public confidence.
>
> * * * * * *
>
> A corporation, having carried its account with a bank, having borrowed from that bank for its ordinary commercial requirements, is confronted with the question of raising long-term funds by the issuance of securities. If it is to have the advice of its banker untainted by the prospect of obtaining an originating or underwriting profit we must keep the banks out of the security business.

In addition to the prospect of an underwriting profit, a desire to avoid the effects of bad loans also impaired the impartial judgment of a number of

banks who had to evaluate the desirability of a securities issue by a loan customer. In the Glass-Steagall Act, Congress intended that "The public will be protected against the possibility of being offered bonds which represent bad banks loans or 'dirty linen' converted through a security affiliate." 75 Cong. Rec. 3954 (May 22, 1933) (remarks of Rep. Bacon). See also 75 Cong. Rec. 9912 (May 10, 1932) (remarks of Senator Bulkley): "If the public is to be protected against the possibility of bad bank loans being set up into bond issues to be sold to savings depositors of the same banks without the exacting scrutiny of an independent underwriter interested primarily in the soundness of the securities he is about to sell we must prohibit the banks from engaging in the security business."

Congress was also concerned that banks engaged in the securities business often suffered "the embarrassment of having to appraise, as collateral security offered by prospective borrowers, the very securities" which the banks or their affiliates had sold. 75 Cong. Rec. 9912, 9914 (May 10, 1932) (remarks of Senator Bulkley), 77 Cong. Rec. 3954 (May 22, 1933) (remarks of Senator Bacon).[1]

d. Congress was further concerned that direct bank investment in securities created pressure for banks to make unsound loans to companies to maintain the price of securities generally or the financial position of the borrower companies in which the banks had holdings. Unsound bank loans were also made to bank customers in order to finance the purchase by them of securities on which the lending bank made an originating or underwriting commission. Banks frequently

[1] The Comptroller's regulation governing the collective fund now before the Court provides: "A bank administering a collective investment fund shall not * * * (b) make any loans on the security of a participation in such fund." 12 C.F.R. 9.18(b)(8)(i).

made unsound loans to their security affiliates. As Senator Bulkley stated (75 Cong. Rec. 9911–12, 9914—May 10, 1932):

> * * * Can there be any doubt that in order to maintain the market conditions which would absorb the great production of capital securities and produce the big profits for the affiliates and bond departments commercial banks went astray by encouraging an overdevelopment of collateral-security loans? Is it not fair to attribute the vast development of loans on collateral security at least in part to the necessity for keeping up a market condition capable of absorbing capital issues? * * *
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> * * * If we are to keep banks from being tempted to make security loans in order to help make a market or to finance the purchase of securities on which the lending bank is making an originating or underwriting commission we must keep banks out of the investment security business. * * *
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> * * * * *
>
> * * * We feel that by removing the bankers from the temptation of using credit in such a way as to make a good background and foundation for the flotation for more security issues we are protecting the depositors * * *.

See also Hearings Pursuant to S. Res. 71 before a Subcommittee of the Senate Committee on Banking and Currency, 71st Cong., 3d Sess., pp. 20, 237, 1017, 1066–67 (1931); 77 Cong. Rec. 3954 (May 22, 1933) (remarks of Rep. Bacon); Sen. Rep. No. 1455, 73d Cong., 2d Sess., p. 186 (1934).

e. Congress was disturbed that the abuses, described above, resulting from the intermingling of commercial and investment banking, had impaired public confidence in the banking system. Public confidence in

banks was also undermined by the losses experienced by security affiliates, who were closely associated with the banks in the public mind. By separating commercial from investment banking, and eliminating the interlocking relationships between banks and security affiliates, Congress sought to restore public confidence in the banking system. See, *e.g.*, 75 Cong. Rec. 9912, 9915 (May 10, 1932) (remarks of Senator Buckley); 75 Cong. Rec. 9981 (May 11, 1932) (remarks of Senator Norbeck); 77 Cong. Rec. 3835 (May 20, 1933) (remarks of Rep. Steagall); 77 Cong. Rec. 3907 (May 22, 1933) (remarks of Rep. Kopplemann).

f. Another central concern of Congress was that the investment business of banks, and their relationships with security affiliates, was diverting the resources of the commercial banking system to speculative purposes never contemplated by Congress. See Sen. Rep. No. 77, *supra*, p. 8:

> The outstanding development in the commercial banking system during the prepanic period was the appearance of excessive security loans, and of overinvestment in securities of all kinds. The effects of this situation in changing the whole character of the banking problem can hardly be overemphasized. National banks were never intended to undertake investment banking business on a large scale, and the whole tenor of legislation and administrative rulings concerning them has been away from recognition of such a growth in the direction of investment banking as legitimate. * * *

As Senator Glass stated (75 Cong. Rec. 9884—May 10, 1932):

> * * * In large degree the system has been transformed into an investment banking system, whereas the fixed purpose of Congress was to set up a commercial banking system and to preclude speculative operations.

Representative Steagall summed up the purposes of his bill in the following language (77 Cong. Rec. 3835 —May 20, 1933):

> The great Federal Reserve Act was enacted as a result of the lessons of experience gathered from conditions that existed in 1907 and prior to that time. Under the Federal Reserve Act we experienced a period of progress and prosperity unparalleled in all our history. Under that act we financed the greatest war in all the tide of time and emerged from that conflict the financial center of the world and the dominating force in the diplomacies of mankind. Under that act credit facilities have been afforded for domestic purposes and also a large measure of the credit requirement for international trade and business.
>
> But we seemed to forget the lessons of experience. We departed from sound banking principles. Our great banking system was diverted from its original purposes into investment activities, and its service devoted to speculation and international high finance. Our financial leaders went on a spree. They cranked up our great financial machine, charged it with high-powered gas, and soared away toward the heavens, forgetting that there would ever be need for a place to land or that a wreck awaited them. Agriculture, commerce, and industry were forgotten. Bank deposits and credit resources were funneled into the speculative centers of the country for investment in stocks operation and in market speculation. Values were lifted to fictitious levels. Call-money rates went soaring, community bankers over the Nation were lured away from normal and legitimate channels into a maelstrom of untried and destructive activities.
>
> Bankers engaged in extending credits for legitimate purposes, for loans in support of commerce and agriculture and for community service and the development of community life,

were urged to abandon this service and place their investments in what were represented to them as sound and liquid securities. A campaign was turned on urging bankers everywhere to take out of their portfolios papers representing the collateral and the character of local citizens and to employ their facilities in investment banking, in speculation, in stock gambling, and in aid of wild and reckless international high finance.

The purpose of the regulatory provisions of this bill is to call back to the service of agriculture and commerce and industry the bank credit and the bank service designed by the framers of the Federal Reserve Act.

The purpose is to strengthen the banking structure, to establish adequate capital requirements, to provide more effective regulation and supervision, to eliminate dangerous and unsound practices, and to confine banks of deposit to legitimate functions and to separate them from affiliates or other organizations which have brought discredit and loss of public confidence. We propose to see to it that hereafter the credit facilities of the Federal Reserve System shall be devoted primarily to the purposes to which that great act was dedicated at the outset.

* * * * *

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FIRST NATIONAL CITY BANK,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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American Trucking Ass'ns v. United States, 364 U.S. 1 (1960) 29

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Board of Governors v. Agnew, 329 U.S. 441 (1947) 24

Brooklyn Trust Co. v. Commissioner, 80 F.2d 865 (2d Cir. 1936) 9

Data Processing Service v. Camp, 397 U.S. 150 (1970) 26, 27, 28, 29, 30

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Gerald M. Greenberg, Exchange Act Release No. 34-6320 (July 21, 1960) 7

Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968) 26

National Ass'n of Securities Dealers v. S.E.C., U.S. Sup. Ct. No. 59 (October Term, 1970) 12, 25

Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970) 27, 30

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Statutes:

5 U.S.C. §§701 *et seq.*, Supp. V, 1970 ..... 29, 30
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17 C.F.R. §230.134 (1958) 17
17 C.F.R. §240.15b10-3 (1967) 7

Other Authorities:

Bacheller, *Sales Incentives in Trust Selling,* TRUST BULL., Jan. 1966, at 24 17
Barclay, *Collective Investment Under Regulation 9,* 102 TRUSTS AND ESTATES 361 (1963) 8
Barclay, *The Estate Planning Policy Statement,* 99 TRUSTS AND ESTATES 1146 (1960) 10
Bronston, *Bank Collective Investment Funds,* 46 TRUST BULL. 230 (1966) 8
Bulletin of the Comptroller of the Currency, Oct. 26, 1936, ¶35 20
Comptroller's 1963 Annual Report to Congress, H.R. Doc. No. 317, 88th Cong., 2d Sess. (1963) 2, 3, 9, 11, 14

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3 DAVIS, ADMINISTRATIVE LAW (1958) 27
Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970) 30
Digest of Opinions of the Comptroller of the Currency Relating to Operations and Powers of National Banks ¶220 (April 1, 1960), 4 CCH FED. BANKING LAW ¶59,654 20

2 Fed. Reg. 2976 (1937) 9
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33 FED. RES. BULL. 1115 (1947) 10
36 FED. RES. BULL. 645 28
41 FED. RES. BULL. 142 (1955) 10
42 FED. RES. BULL. 228 (1956) 10

Gerber, *Current Legal Regulatory Developments*, 1 NATIONAL BANKING REV. 133, 261 (1963) 13

Harris, *Trust Division Annual Report*, TRUST BULL., Oct. 1965, at 13 24
Hearing on Common Trust Funds Before Subcomm. of House Comm. on Government Operations, 88th Cong., 1st Sess. (1963) 5, 21, 27
Hearings on H.R. 8499 and H.R. 9410 Before the Sub-Comm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 88th Cong., 2d Sess. (1964) 13
Hearings on S. 2704 Before a Subcomm. of the Senate Comm. on Banking and Currency, 89th Cong., 2d Sess. (1966) 5
Heniken, *Television and Radio—Media for Joint Advertising Ventures*, TRUST BULL., Sept. 1962, at 37 17

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House Comm. on Government Operations, Common Trust Funds—Overlapping Responsibility and Conflict in Regulations, H. Rep. No. 429, 88th Cong., 1st Sess. (1963) 9

Investment Company Act Release No. 40-2621 (Nov. 5, 1957) 17

Investors' Reader, Oct. 7, 1970, at 15 7

Judd, *Common Trust Funds Today*, 102 Trusts and Estates 38 (1963) 8

Restatement (Second) of Agency (1957) 15

Securities Act Release No. 33-3856 (Oct. 31, 1957) 17

Securities Act Release No. 33-4709 (July 14, 1964) 17

Trust Division, American Bankers Association, *Common Trust Funds* (2d ed. 1948) 8

(3d ed. 1956) 8

102 Trust and Estates 239 (1963) 8

Wolfe, *Wider Horizons for Common Trust Funds*, 101 Trusts and Estates 1075 (1962) 10

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REPLY BRIEF FOR PETITIONERS

I.

The issue is whether the Comptroller may authorize the Citibank type of investment fund—not whether he may authorize banks to commingle assets held in managing agency accounts.

Respondents do not dispute that a mutual fund is engaged in the business of issuing and selling securities within the meaning of the Glass-Steagall Act (Citibank Br. 46, 57).[1] Nor do they dispute that Section 21 of the Act (12 U.S.C. § 378) therefore prohibits banks from engaging in the mutual fund business just as it prohibits mutual funds

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[1] Citations to the Comptroller's brief are herein referred to as "Compt. Br.," to Citibank's brief as "Citibank Br.," and to petitioners' principal brief as "Pet. Br."

from engaging in the banking business. Respondents concede, moreover, the "competition" and "points of similarity" between Citibank's "Commingled Investment Account" and at least "no load" mutual funds (Citibank Br. 12).

Respondents claim, however, that the Act still does not apply to the Citibank type of fund which now stands as the prototype for bank-sponsored investment funds (A. 94). They pretend that the Comptroller's approval of such funds simply permits banks to pool managing agency accounts in the same manner as they have for many years pooled trust assets in common trust funds. Three related points expose the fiction:

1. Banks have been prohibited from holding out common trust funds to the public as investment media on the ground that such activity would constitute selling interests to the public in investment funds. Banks have been permitted to commingle trust assets solely to aid administration of the underlying trusts. Under such permissible type of commingling, trust officers exercise discretion, based on their judgment of the particular beneficiaries' requirements, to invest various assets from time to time in the bank's common fund. See pp. 6-10, 12-13, *infra*.

2. The original concept of Regulation 9 was to extend a like authority, with like restrictions, to the commingling of assets held in managing agency accounts, again as determined by individual trust officers in accordance with the particular needs of each customer. The Comptroller's 1963 Annual Report to Congress represented that the restrictions of Regulation 9 were designed to make certain that banks could not

> "engage in the selling of interests in pooled funds. Accordingly, there may be no agreement between the bank and the customer that the latter's funds will be

invested in collective investment funds, nor may managing agency contracts be operated or held out as interests in a collective investment fund." H.R. Doc. No. 317, 88th Cong., 2d Sess. 14 (1963).

In 1965, however, Comptroller James J. Saxon abandoned these restrictions when he approved the Citibank fund (see pp. 11-12, *infra*), and announced that all similar funds would also be approved (A. 94, 205).

3. The Citibank prototype plan permits the very sale of interests in a pooled fund that the Comptroller had told Congress Regulation 9 was designed to prohibit. The plan does not contemplate that bank trust officers will exercise discretion whether or not assets held in particular "managing agency" accounts should be invested in a commingled fund. Indeed, the bank may know no more about its customer than his name, address and social security number. See note 5, *infra*. The customer's money is accepted solely for direct and automatic investment in the commingled fund. The customer's relation with the bank begins with investment of his money in the pooled fund and terminates upon withdrawal of his share from the pooled fund (which the customer can effect at any time) (A. 147, 148, 150-51, 158, 197-98, 201-03). The fund itself is held out to the public as an investment medium (A. 170; see also Appendix B to this brief). The "managing agency" form contracts (A. 158-59) are merely the legal device by which the public is sold interests in the pooled fund.

The Citibank "Commingled Investment Account" is thus a far cry from both the common trust fund and the Comptroller's original concept of Regulation 9, under which he was to impose restrictions upon the commingling of managing agency accounts similar to those which had long

applied to common trust funds. See pp. 10-12, *infra*. Accordingly, respondents' central argument that the commingling of managing agency accounts is essentially the same as the pooling of assets in a common trust fund (Compt. Br. 39-40; Citibank Br. 22, 25, 31-32, 39) is beside the point. The issue is whether the Comptroller had authority to approve Citibank's prototype fund, not whether the Comptroller could have authorized commingling of managing agency accounts under restrictions not here applicable.

II.

The Citibank type of fund necessarily involves the issuance and sale of securities within the meaning of the Glass-Steagall Act.

Petitioners contend that a bank which operates a fund like that of Citibank is engaged in the business of issuing and selling securities within the meaning of the Glass-Steagall Act for the same reasons that a mutual fund has been held to be engaged in the business of issuing and selling securities within the meaning of that Act. See pp. 20-22, 27-28, *infra*. In both cases, the securities—by whatever name called—are the ownership interests in the fund.

Respondents incorrectly attribute to petitioners a "contention that the term 'securities' has the same meaning in Glass-Steagall as in the federal securities laws" (Compt. Br. 37; see also Citibank Br. 53-54). Petitioners do not so contend. Petitioners rely instead on the substance and reality of Citibank's fund, just as the Federal Reserve did in concluding that the "units of participation" in Citibank's fund are "securities" *within the meaning of the Glass-*

Steagall Act[2] (a fact which neither respondent mentions).[3] The SEC likewise relied on the economic realities in concluding that Citibank's fund and the ownership interests in it required registration under the Securities and Investment Company Acts.[4] Petitioners contend that Citibank is operating a mutual fund and is engaged in the business of issuing and selling securities within *any* rational definition of those terms.

Respondents do not dispute that the sale of shares in an open-end investment fund ordinarily constitutes an engagement in securities activities within the meaning of the Glass-Steagall Act (Citibank Br. 46). Nor do we understand

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[2] The Federal Reserve's Memorandum of December 15, 1965, stated:

"PARTICIPATIONS WOULD BE 'SECURITIES'

"Counsel for First [Citibank] urged that the participations or interests in Account would not be 'stocks, bonds, or other similar securities,' within the meaning of section 32 [of the Glass-Steagall Act]. . . .

"The Board, however, has consistently taken the position that participations or shares in an ordinary open-end investment company or mutual fund are 'securities' for the purposes of section 32. (See, for example, 12 CFR 218.101, 1951 Federal Reserve Bulletin 645.) The Board also has expressed the view that 'participating units', which were essentially partnership shares, were 'securities' within the meaning of section 32. The principle applied by the Board was that the statute was sufficiently broad to comprehend securities which, while neither stocks or bonds, have attributes which cause them to be 'similar' to, or somewhat like, either bonds or stock." Reprinted in *Hearings on S. 2704 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 89th Cong., 2d Sess. 583-84 (1966).

[3] Yet respondents rely on other portions of the same Federal Reserve decision (Citibank Br. 5, 16, 27, 35-36, 44, 59, 62; Compt. Br. 45 n.37).

[4] 15 U.S.C. §§ 77a *et seq.*; 15 U.S.C. §§ 80a-1 *et seq.* See *Hearing on Common Trust Funds Before Subcomm. of House Comm. on Government Operations*, 88th Cong., 1st Sess. 136-37 (1963).

them to dispute that banks are thereby barred from sponsoring garden-variety mutual funds. Their argument that banks may operate the Citibank type of fund rests on three untenable propositions:

(i) The Citibank type of fund is only a "modest extension" of the common trust fund (Citibank Br. 35);

(ii) There are, on the other hand, fundamental differences between Citibank's mutual fund and ordinary mutual funds; and

(iii) The Glass-Steagall Act exempts from its coverage securities activities conducted by banks in a "fiduciary" capacity.

A. *The Sale of Ownership Interests in a Citibank Type of Fund Cannot Be Equated With the Lawful Operation of a Common Trust Fund.*

Respondents contend that:

> "For more than three decades [national banks] have been reducing the cost and thus extending the availability of trust service by commingling the assets of separate trusts in common trust funds for collective investment. *The sole function of Regulation 9.18 and the Citibank plan is to permit the same commingling and reduction of costs in the case of managing-agencies*" (Citibank Br. 20 (emphasis added); see also Compt. Br. 39-40).

The history of common trust funds proves that the Citibank plan by no means involves the "same commingling" as had been permitted in the case of common trust funds. Indeed, banks have since the 1930s been prohibited from using a common trust fund in the manner in which Citibank uses its pooled fund. Under the Citibank type of plan, investors—of whom the bank may know nothing more than their name,

address and social security number[5]—are induced to place their money with the bank for direct investment in a collective fund. The American Bankers Association and the Federal Reserve Board have uniformly condemned all such arrangements in the case of common trust funds.

1. Banks have been prohibited from using common trust funds as investment media.

The American Bankers Association has for years told its members that a common trust fund can only be used as "a tool or method for handling accounts both on the books now and to come on the books in the natural course of business" and that a bank may not

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[5] Under the Citibank plan approved by the Comptroller, the bank may not even be in a position to make the kind of determination as to the suitability of the fund as an investment for a particular customer that a broker or dealer must make in selling mutual fund shares. See SEC Exchange Act Rule 15b10-3, 17 C.F.R. § 240.15b10-3 (1967); *Gerald M. Greenberg*, Exchange Act Release No. 34-6320 (July 21, 1960), at 6. Under Citibank's plan, it is not only possible, but probable, that people who are virtual strangers to Citibank's trust department will become investors in its fund. Thus, one of the millions of people who are customers of the bank may receive a copy of Citibank's sales flyer through the mail (A. 170, 42, 275 n.9; Pet. Br. 41). A customer or visitor at any of Citibank's branches may also learn of the fund through sales literature at the counter (a copy is attached as Appendix B to this brief) which in turn encourages the visitor to ask for a free prospectus. (An earlier version of the prospectus is in the record, A. 146-60.) Citibank now has 2 million retail customers and 190 branches. INVESTORS' READER, Oct. 7, 1970, at 15; see also Pet. Br. 41. A member of the public may also learn of the availability of such literature through Citibank's advertisements. See pp. 16-17, *infra;* see also 12 C.F.R. § 9.18(b)(5)(iv) (1963, as amended). Any of these potential investors may join the fund by tendering his money by mail along with the tear-out authorization form which accompanies the sales literature. *The only information about the customer on the form is the customer's name, address and social security number* (A. 158). In the face of these facts, and despite Judge Bazelon's dismissal of their contention in this regard (A. 275 n.9), both respondents still find it necessary to advance their

> "operate a common trust fund so as to compete with savings departments or investment trusts, merely to swell the volume of its trust assets through the attraction of money seeking investment alone." Trust Division, American Bankers Association, *Common Trust Funds* 16 (2d ed. 1948); see also *id.* 17, 22-23.

The current version of *Common Trust Funds* (3d ed. 1956) states:

> "The corporate trustee . . . must restrict its trust new business efforts, insofar as accounts to participate in its common trust fund are concerned, to accounts definitely having a fiduciary character, *and must never regard itself in this capacity as a competitor of exclusively investment media.*" *Id.* at 19-20 (emphasis added); see also *id.* at 22.*

These conclusions of bank trust officials reflect the views of the Federal Reserve Board in promulgating and in

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discredited claim that "if the Bank is satisfied that the investment policy of the Account is suitable for the individual's needs, it accepts his money . . ." (Compt. Br. 10; see Citibank Br. 11). That is all respondents have to connect Citibank's "Commingled Investment Account" with the personal attention to individual customers' particular needs that has always been the essence of fiduciary services by bank trust departments under 12 U.S.C. § 92a.

* These exhortations have been both well understood and rigorously followed by responsible bankers. Thus, G. C. Barclay, former President of the Trust Division of the American Bankers Association (see 102 TRUSTS AND ESTATES 239, 242 (1963)), asserted that "use of common trust funds for purely investment purposes" creates

> "the danger that a participation in a common trust fund will come to be looked upon as a security available for 'purchase' by any member of the general public without regard for the fiduciary aspects." Barclay, *Collective Investment Under Regulation 9*, 102 TRUSTS AND ESTATES 361 (1963).

See also Bronston, *Bank Collective Investment Funds*, 46 TRUST BULL. 230, 231 (1966); Judd, *Common Trust Funds Today*, 102 TRUSTS AND ESTATES 38, 39 (1963).

interpreting its "Regulation F," the precursor of the Comptroller's Regulation 9.[7]

The Federal Reserve's regulation provided that

> "the operation of such Common Trust Funds as investment trusts for other than strictly fiduciary purposes is hereby prohibited." 2 Fed. Reg. 2976 (1937).

The Board said "that a Common Trust Fund should be used merely to aid in the administration of trusts by a trust institution through the commingled investment of funds of various trusts" (26 FED. RES. BULL. 393 (1940)), and warned that:

> "While the operation of a Common Trust Fund might thus enable a trust institution to accept small trusts which it otherwise would be unwilling to handle, it was contemplated *that trust guise or form should not be used to enable a trust institution to operate a Common Trust Fund as an investment trust attracting money seeking investment alone and to embark upon what would be in effect the sale of participations in a Common Trust Fund to the public as investments.*" *Id.* (emphasis added).

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[7] Regulation F, 2 Fed. Reg. 2976 (1937), was promulgated to establish conditions under which common trust funds would enjoy an income tax exemption. Section 169 of the Revenue Act of 1936 was designed to overcome the ruling in *Brooklyn Trust Co.* v. *Commissioner*, 80 F.2d 865 (2d Cir. 1936), that a common trust fund was a taxable entity. As carried over into Section 584 of the *Internal Revenue Code of 1954*, the statute limits the exemption to common trust funds operated

> "in conformity with the rules and regulations of the Board of Governors of the Federal Reserve System [now of the Comptroller of the Currency]."

The purpose of conferring regulatory approval upon the Federal Reserve was to allay fears that the funds might be "commercialized or used for speculative purposes." HOUSE COMM. ON GOVERNMENT OPERATIONS, COMMON TRUST FUNDS—OVERLAPPING RESPONSIBILITY AND CONFLICT IN REGULATIONS, H. Rep. No. 429, 88th Cong., 1st Sess. 5 (1963). See also the Comptroller's 1963 Annual Report, *supra* pp. 2-3, at 371.

The Federal Reserve later denied an application by a bank for permission to accept the placement of sums in the bank's common trust fund because:

> "The analogy with the purchase of investment trust certificates is apparent; *and the use of a common trust fund for this purpose amounts in substance to the operation of the fund as an ordinary investment trust.*" 33 FED. RES. BULL. 1115 (1947) (emphasis added).[8]

Thus, contrary to respondents' claims (and contrary to the assumption of the court below—see A. 278) the history of common trust funds shows that banks could not lawfully use such funds in the manner and for the purposes contemplated by the Comptroller in approving the Citibank type of fund.[9]

2. The prototype fund approved by the Comptroller is no mere extension of the common trust fund authority to managing agencies.

At the time Regulation 9 was promulgated, the Comptroller indicated that its restrictions would maintain the

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[8] See also 42 FED. RES. BULL. 228 (1956); 41 FED. RES. BULL. 142 (1955).

[9] Citibank's assertion that the "Federal Reserve forbade commingling for a number of years, except in the case of strict trusts, but subsequently changed its position" (Citibank Br. 36) is baseless insofar as it suggests that the Board had switched its position on the propriety of banks using a commingling authority of any kind to sell shares in a bank-sponsored mutual fund to the public. Indeed, shortly before the authority over bank trust activities passed to the Comptroller, the Board was so concerned over the possibility that banks might abuse their commingling authority to sell interests in a pooled fund that it proposed to bar banks from investment of revocable inter vivos trusts in common trust funds. A hearing on the proposed rule was held before the Board on May 22, 1961, but no decision was reached by September 1, 1962. See Barclay, *The Estate Planning Policy Statement*, 99 TRUSTS AND ESTATES 1146, 1148 (1960); Wolfe, *Wider Horizons for Common Trust Funds*, 101 TRUSTS AND ESTATES 1075, 1076 (1962).

above-discussed distinctions between the lawful and unlawful uses of common trust funds. The Comptroller's 1963 Annual Report to Congress stated in pertinent part that:

> "[O]nly monies of agency accounts where the bank has assumed fiduciary duties identical to those of formally designated trustees, executors, administrators or guardians qualify as managing agency accounts. As a further restriction, the agreement establishing such an account must expressly provide that funds of the account are received by the bank in trust before the funds of such accounts may be collectively invested." Comptroller's 1963 Annual Report, *supra* pp. 2-3, at 14.

The Report further stated that although the Regulation did not expressly incorporate the prior requirement limiting the commingling authority to accounts established for "bona fide fiduciary purposes," the regulations imposed restrictions which

> "were designed to make clear that the abandonment of the 'bona fide fiduciary purpose' language was not intended to permit banks to engage in the selling of interests in pooled funds. Accordingly, there may be no agreement between the bank and the customer that the latter's funds will be invested in collective investment funds, nor may managing agency contracts be operated or held out as interests in a collective investment fund." *Id.*

The Comptroller further reported that, in view of these restrictions, "the sale by the bank of interests in a collective investment fund is prohibited." *Id.*

Despite these representations, the Comptroller in fact approved a bank fund which accomplishes the very objectives that he assured Congress his Regulation 9 was designed to prohibit. In contrast with his representation that "there

may be no agreement between the bank and the customer that the latter's funds will be invested in collective investment funds"—so as to prohibit a bank from "selling interests" in its fund—the Comptroller approved arrangements between Citibank and its customers under which the latter's money can *only* be invested in the bank's collective investment fund. (A. 142, 147-48, 150-51, 158, 197-98, 201-03.) Any realistic appraisal of Citibank's managing agency contracts and the prospectus which they incorporate requires the conclusion that they are operated or held out as interests in a collective investment fund (A. 170). The requirement that the customers' money be received in trust was likewise abandoned in the approval of Citibank's fund (A. 158, 201-02; see also Pet. Br. 7-8; Brief for United States as Amicus Curiae at 7 n.4, *National Ass'n of Securities Dealers* v. *S.E.C.*, U.S. Sup. Ct. No. 59, October Term, 1970).

These differences between the Citibank type of fund and what was originally intended in extending the common trust authority to managing agency accounts are reflected in testimony given in 1964 by the American Bankers Association representative in support of proposed legislation to permit banks to commingle managing agency accounts, subject to certain controls:

> "Before there can be a bank collective fund there must first be a number of individual fiduciary accounts, trust or agency with the bank.
>
> "By contrast, a person who buys shares in a mutual fund does so exactly as he buys shares in any other corporation.
>
> "Before any funds can be invested in a bank collective fund two separate decisions must be made inside the bank. The bank really has a double responsibility.

"The first decision is what part, if any, of the funds in the individual account are to be invested through the medium of one or more of the bank's collective funds.[10]

. . .

"It should be noted that the bank when it decides to put all or part of an account into a collective fund, exercises a fiduciary judgment for which it may be called to account in a court of law. There is no comparable responsibility on the mutual fund salesman.

. . .

"This requirement [that the bank exercise a fiduciary judgment] eliminates any possibility of a managing agency contract providing for the direct or automatic investment of a management agency account in a collective fund." *Hearings on H.R. 8499 and H.R. 9410 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 88th Cong., 2d Sess. 87-88 (1964) (emphasis added).

Citibank's "Commingled Investment Account" falls on the mutual fund side of the line on each factor relied upon by the Bankers Association.

There is no requirement that the "managing agency" accounts pre-exist their investment in the commingled fund; under Citibank's plan, a person will secure an interest in the fund simultaneously with the bank's acceptance of his money, exactly as one buys shares in a mutual fund.[11] There is no "first decision" by the bank as to "what

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[10] The Comptroller had announced, soon after Regulation 9 was promulgated, that under its requirements, the "decision to invest funds of a managing agency account in a common trust fund, or in any other investment program, is made by the bank." Gerber, *Current Legal Regulatory Developments,* 1 NATIONAL BANKING REV. 133, 139-40 (1963). See also Gerber, *Current Legal Regulatory Developments,* 1 NATIONAL BANKING REV. 261, 266 (1963).

[11] In contrast, the Comptroller had in 1963 submitted a legal memorandum to Congress in which he asserted that SEC was

part, if any" of the customer's money is to be invested in the commingled fund. It is all invested in the commingled fund, automatically. See p. 12, *supra*. This also serves to emphasize the importance of the last of the above-quoted requirements cited by the Bankers Association—namely, that to preclude a bank from converting the commingling authority into authority to operate a mutual fund, the bank must be prohibited from entering into "a managing agency contract providing for the direct or automatic investment of a management agency account in a collective fund." Under Citibank's plan (in which the "managing agency" form contract incorporates the terms of the prospectus) the customer's money is taken solely for direct and automatic investment in the collective fund. The plan admits of no other possible disposition of the customer's money. See p. 12, *supra*.

In every significant respect, therefore, the Citibank plan contemplates the sale of an interest in a pooled fund; its "Commingled Investment Account" [12] is simply a conventional mutual fund operated by a bank.

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wrong in contending that a managing agency contract involves the sale of "an interest in the pooled fund" because, under Regulation 9 ". . . the investment of monies in a collective fund is but one option available to the bank in executing its investment responsibility. Indeed, a requirement in a managing agency agreement that investment must be made in a collective fund would clearly be improper under Regulation 9 . . . ." Reprinted in Comptroller's 1963 Annual Report, *supra* pp. 2-3, at 373.

[12] Other banks which have active plans to establish similar funds are willing to call a spade a spade. SEC filings disclose application or registration statements for: "First Chicago Growth Fund" and "First Chicago Investment Fund" (First National Bank of Chicago); "Continental Bank Security Fund" and "Continental Bank Growth Fund" (Continental Illinois National Bank); "Northwestern Investment Fund" (Northwestern National Bank of Minneapolis); "Citizen's Investment Fund" (Citizens Bank & Trust Co., Park Ridge, Ill.); "First Minneapolis Growth Invest-

B. *There Are No Substantial Differences Between the Prototype Fund Approved by the Comptroller and an Ordinary Mutual Fund.*

Respondents' claim that Citibank's "Commingled Investment Account" significantly differs from ordinary mutual funds rests mainly on attributing magical qualities to the word "fiduciary." The claim also rests on exaggerating the significance of the controls imposed by Regulation 9. These claims provide no basis for distinguishing Citibank's fund from garden-variety mutual funds.

1. *The relationship between the bank and the customer is no more and no less "fiduciary" than is the relationship between the customer and the sponsor of a conventional mutual fund.* Respondents assert that the relationship between the customer and the bank is that of principal and agent and that "an agent is a fiduciary" (Citibank Br. 21, 29-30). The analysis is not helpful. Since Citibank's plan requires automatic investment of the customer's money into a collective fund, the operation of which is in the bank's complete discretion, familiar characteristics of the usual principal-agent relationship are lacking. Citibank's customer has only a share in the bank's fund rather than title to property turned over to the bank for "management," and he has no control over the manner in which the bank as his "agent" operates the commingled fund. Compare RESTATEMENT (SECOND) OF AGENCY §§ 13, 14 (1957). In fact, the customer has no more control over the bank's portfolio decisions than does the investor in a typical mutual fund.

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ment Fund" and "First Minneapolis Income Investment Fund" (First National Bank of Minneapolis); "First Managed Fund" (First National Bank in Dallas); "The C&S Investment Fund" (Citizens and Southern National Bank); "Security Trust Growth Fund" (Security Trust Co., Rochester, N. Y.); and "Northern Growth Fund" and "Northern Investment Fund" (Northern Trust Company, Chicago).

Respondents also rely on particular obligations imposed upon the bank under Regulation 9 for proof of the bank's "fiduciary" status (Citibank Br. 33). Similar obligations are imposed (and with greater specificity) upon mutual funds and their investment advisors under the Investment Company Act of 1940 (see particularly Sections 9, 10, 12, 17, 21, 30, 31, 32, 36, 37, 15 U.S.C. §§ 80a-9, -10, -12, -17, -21, -31, -32, -33, -37, -38), the Investment Advisors Act of 1940 (see particularly Section 206, 15 U.S.C. § 80b-6), and the SEC's rules thereunder.

Thus, looking past the merely formal designations and legal techniques by which Citibank sells interests in its pooled fund—a "managing agency" agreement, which incorporates the terms of a prospectus (A. 158)—the substance of Citibank's relationship to its customer is exactly the same as that of the ordinary mutual fund to its shareholder. Neither is one whit more or less "fiduciary" than the other.

2. *The limits which Regulation 9 places upon the extent to which Citibank may advertise its fund do not differ significantly from restraints upon mutual fund advertising.* Respondents imply (a) that there are no significant limitations on the rights of ordinary mutual funds to advertise, and (b) that prohibiting the bank's advertising its fund "except in connection with the bank's general fiduciary services" (Citibank Br. 33) precludes aggressive selling messages. Both implications are false. Mutual fund advertising is closely regulated under the Securities Act of 1933, the Investment Company Act of 1940, and the SEC regulations under both statutes.[13] On the other hand, re-

[13] The Securities Act and the rules and regulations thereunder impose serious restrictions on the type of advertising which a mutual fund can use. See Section 2(10), 15 U.S.C. § 77b(10);

quiring Citibank to advertise its fund only in the "context of other fiduciary services of the bank" is not a significant limitation. The attached samples of Citibank's trust department advertising[14] touting their "hard-nosed pros" who help "beat the shrinking dollar through a performance-minded investment program" show that such a limitation does not preclude aggressive merchandising (see Citibank Br. 33).[15]

3. *The fact that the customer pays no sales load is irrelevant.* That is the very definition of a "no load" fund which Citibank concedes is engaged in the securities business within the meaning of the Glass-Steagall Act (Citibank Br. 57).

4. *There are no significant differences between the Bank's fee and the fees paid to investment advisors of ordinary mutual funds.* Respondents state loosely that

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Securities Act Rule 134, 17 C.F.R. § 230.134 (1958). The SEC has made clear that the "tombstone" advertisement permitted by Securities Act Rule 134 is not to include selling literature of any kind, but rather must be limited to a description of the nature of the offering. For example, the SEC has stated that the Rule prohibits the use of photographs, references to the performance of a fund as compared to the Dow Jones averages, and the listing of a fund's portfolio. See Securities Act Release No. 33-4709 (July 14, 1964). In addition, the SEC has adopted a Statement of Policy under the Securities Act of 1933 and Investment Company Act of 1940 which puts stringent restrictions on both advertising and supplemental sales literature. For example, any comparison of the mutual fund with any other security or medium of investment or any popular stock price index must contain numerous qualifications as to why the comparison is fair. See Securities Act Release No. 33-3856 (Oct. 31, 1957); Investment Company Act Release No. 40-2621 (Nov. 5, 1957).

[14] Appendix A to this brief.

[15] See also Heniken, *Television and Radio—Media for Joint Advertising Ventures*, TRUST BULL., Sept. 1962, at 37; Bacheller, *Sales Incentives in Trust Selling*, TRUST BULL., Jan. 1966, at 24, 27.

"under Regulation 9 the bank is compensated only as a fiduciary" and the bank's fees are "subject to the Comptroller's scrutiny" (Citibank Br. 34). The Regulation in fact places no dollar limitation upon the bank's fee but only upon the method by which it is calculated. 12 C.F.R. § 9.18(b)(12) (1963, as amended). As we have previously pointed out (Pet. Br. 13, 42), the traditional level of fees for investment advisory services in the mutual fund industry is the same as or less than Citibank's fee of one-half of 1 percent.[16]

Thus, the argument that banks should be able to enter the mutual fund business on the basis of the distinctions advanced by respondents would lead to the fragmented and contradictory positions that (1) garden-variety mutual funds are subject to the Glass-Steagall Act, while bank mutual funds would be free of those prohibitions—although both represent, in economic reality, identical means by which the public may invest in pools of securities; and (2) no-load mutual funds would be subject to the Act, while their twin, the bank mutual fund would not.

C. *The Glass-Steagall Act Contains No Exemption for the Allegedly "Fiduciary" Securities Activities Involved in This Case*

Respondents' argument is based on two propositions: (1) Section 16 in terms exempts from the prohibitions of

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[16] At least one bank which has an application before the SEC for approval of a bank mutual fund provides for fees in excess of what Citibank's fund and other mutual funds generally charge. "Continental Bank Security Fund" (SEC File 2-36449-1) provides for an annual fee of ½ of 1 percent for investment management, plus 1/10 of 1 percent for custodial services and 2/10 of 1 percent for administrative services.

the Glass-Steagall Act securities activities carried out by a bank's trust department; and (2) the Act should not be held applicable to a mutual fund operated by a bank's trust department because a bank cannot make a speculative profit from such a fund.

1. Respondents assert that the Act explicitly exempts from its prohibitions securities activities by national bank trust departments. They argue that Section 16—in prohibiting bank securities activities "for its own account" while authorizing such activities "for the account of customers"—authorizes banks to buy and sell securities in behalf of their trust department customers.[17]

Respondents miss the point of petitioners' contention. They incorrectly assume that petitioners' argument under the Glass-Steagall Act is based on the bank's *portfolio* activities—*i.e.*, the bank's purchase and sale of common stocks and bonds for the portfolio of the collective fund. Petitioners' contention, however, is that the Citibank type of plan is unlawful because it creates a bank-operated mutual fund in which the bank issues and sells ownership interests to the public. It is the issuance and sale of *those* securities—*i.e.*, the ownership interests in the bank-operated mutual fund[18]—which petitioners contend violates the Glass-Steagall Act. Respondents' argument that Section 16 au-

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[17] The Act says:

"The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not undertake any issue of securities or stock . . . ." Section 16, 12 U.S.C. § 24.

[18] As we have noted (pp. 4-5, *supra*), the Federal Reserve held that the ownership interests in Citibank fund—the so-called "units of participation"—are securities within the meaning of the Glass-Steagall Act.

thorizes the bank to buy and sell stocks and bonds for the fund's portfolio is thus beside the point.[19]

2. Respondents also argue that, even acknowledging (albeit grudgingly) that Citibank may be operating a mutual fund (Citibank Br. 12), the Act should still not apply because Citibank does not derive a speculative or underwriting profit, but only profits as a "fiduciary" (Citibank Br. 57-58).

Citibank in fact derives profit from its fund—one-half of 1 percent per annum on the net asset value of the fund (A. 152) and allocation of brokerage commissions (A. 153) —in exactly the same manner as do the sponsors of conventional mutual funds, which the Federal Reserve has long held to be subject to the Glass-Steagall Act (Pet. Br. 25-27, 29-30, 32 n.38).[20] We do not understand respondents to

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[19] The argument also misconstrues Section 16. The statutory phrase "for the account of customers", on which respondents rely, does not support their claim that Section 16 was intended to confer authority upon national bank trust departments to engage in portfolio activities. Section 16 is addressed to all national banks, not merely to those holding trust powers. It neither permits nor prohibits banks from engaging in such portfolio activities—whether in behalf of an individual trust account, an individual managing agency account, or for a collective fund. That authority derives from the banks' fiduciary permit. The limited purpose of the words "for the account of customers" was, as we have shown (Pet. Br. 28-29), to permit a national bank (whether or not authorized to act as a fiduciary) to purchase and sell securities as an accommodation service for regular bank customers. See Bull. of the Comptroller of the Currency, Oct. 26, 1936, ¶ 35 (not publicly circulated; on file in the Office of the Comptroller of the Currency, Treasury Department); Digest of Opinions of the Comptroller of the Currency Relating to Operations and Powers of National Banks ¶ 220 (April 1, 1960), 4 CCH FED. BANKING LAW ¶ 59,654.

[20] The argument in any event ignores the fact that there will be unique pressures on the bank to sell interests in its fund to protect the size of its advisory fees; hence, the fund runs afoul of Congress' aim to prevent bankers from having conflicts of interest in giving investment advice (see Pet. Br. 33-35). The small size of each "account" in Citibank's fund requires a large volume of business (A.

urge that these were wrongly decided by the Federal Reserve (see Citibank Br. 56-57).

Indeed, the record in this case contains a ruling by the Federal Reserve that the Glass-Steagall Act applies to a mutual fund which derives no direct profit from the sale of shares in the fund. In response to an inquiry from petitioner Investment Company Institute, the Board ruled that it was not

> "relevant that the stock is sold to the public through independent organizations with the result that the . . . [mutual fund] derives no direct profit from such sales.
>
> . . .
>
> "For the reasons indicated,[21] the Board continues to be of the opinion that the ordinary open-end investment

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195-96; see also *1963 Hearing supra* note 4, at 8). Further, customers continuously redeem their shares for cash. These factors jointly produce a pressure to sell customers on the virtues of the fund and avoid redemptions which are identical to the pressures on conventional mutual funds. On the other hand, when a trust officer decides to invest part of a trust's assets in the common fund or, conversely, to withdraw part of a trust's assets from the fund and to invest the proceeds elsewhere, the bank's overall income may not change since the size of the trust corpus against which its fee is determined may remain the same. Furthermore, even after the trust officer's withdrawal of a trust's assets from the common fund, the trust itself is still presumably as large and as worthwhile for the bank to administer as it was before. In contrast, a $10,000 managing agency account is too small for the bank to administer (A. 196, 268); hence, redemption of a customer's interest in the bank's mutual fund ends the customer's relation with the bank and reduces *pro tanto* the size of the corpus against which the bank's fee is calculated. Redemptions and new participations are also important because the economies of scale involved affect the fund's overall performance (Pet. Br. 34-35). All these factors necessarily lead to an emphasis upon securing new investors and avoiding redemptions which have no counterpart in other trust department activities, including common trust funds.

[21] The Board had noted earlier in its opinion that a mutual fund is engaged in the "issue" of securities within the meaning of the Glass-Steagall Act because:

company must be regarded as an organization of the kind described in section 32 of the Banking Act of 1933 [the Glass-Steagall Act]" (A. 172).

• • • • •

In sum, then, respondents fail in their effort to bring the Citibank type of fund within some kind of "fiduciary" umbrella. The claim does not survive the fact that Citibank asks no more about the customer than his name, address and social security number. See note 5, *supra*. The savings of the 70-year old widow with no relatives and of the young businessman are automatically placed into a fund geared to "long-term growth of capital and of income" (A. 147). A common trust fund would have been unlawful if operated in the manner contemplated by the Citibank plan.

Even if Citibank had the information with which to make the kind of "suitability" determination that it claims to make, it would be doing no more than what SEC requires of brokers and dealers who sell shares in mutual funds. See note 5, *supra*. The essential features of the Citibank prototype plan—which include holding out of the commingled fund itself as an investment medium, automatic commingling, the right of redemption, daily valuations, the absence of investment discretion once the customer's money is taken, and the use of the fund to attract money seeking investment alone rather than to service existing "fiduciary" accounts—all lead to the conclusion that the bank is in sum and substance selling interests to the public in its funds. The "managing agency" contract is simply the legal device by which the bank sells shares in that fund, which is otherwise indistinguishable from a mutual fund. Therefore, Citibank's description of its plan as one in which

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"A mutual fund is, of course, engaged more or less continuously in the redemption of the stock issued by it and, consequently, it could not well carry on its activities if it did not issue its own stock on a virtually continuous basis" (A. 171-72).

> "a customer-investor desiring to use the Bank's fiduciary services entrusts it with a minimum of $10,000 under a broad authorization which includes specific authority for the bank to invest the customer's funds, together with the funds of other customers who have given the same authorization, through a Commingled Investment Account" (Citibank Br. 10-11)

translated means: "A share in Citibank's mutual fund costs $10,000."

III.

Respondents' policy arguments should be addressed to Congress not the courts.

Several arguments which respondents raise in defense of the Comptroller's approval of Citibank's fund urge in effect that the courts should as a matter of policy lift the barrier between the banking and securities industries, which is now of more than 30 years standing. Such arguments should be directed to Congress.

A. Respondents rely upon a letter from former Federal Reserve Chairman Martin to the Senate Committee on Banking and Currency, appended to Citibank's brief. The letter does not argue that the Glass-Steagall Act is inapplicable to the Citibank type of fund but rather presents policy arguments in support of legislation which would have in effect *amended* the Glass-Steagall Act so as to permit banks to engage in such activities. The thrust of Mr. Martin's position is that, on the basis of experience since 1933, particularly the effectiveness of federal banking and securities regulatory supervision, such funds do not now involve the dangers that Congress in 1933 saw in banks conducting securities activities. This is not the appropriate forum to debate these policy assertions.

This Court rejected analogous contentions in *Board of Governors* v. *Agnew*, 329 U.S. 441, 449 (1947). The Court held it immaterial that the facts showed no actual conflict of interest of the type the Glass-Steagall Act was designed to prevent. The relationship between securities and banking activities there involved was nonetheless barred because the purpose of the Act was "preventive" and "prophylactic."

B. Respondents also argue that as a matter of policy, the literal language of the Glass-Steagall Act should not be held applicable to funds of the Citibank type because the controls imposed by the Comptroller in Regulation 9 prevent the abuses which Congress had in mind in passing the Act (Citibank Br. 33, 57). Most banks, however, would not be subject to Regulation 9. Compliance by state banks with the Regulation is only necessary to secure the tax exemption afforded by *Internal Revenue Code of 1954* Section 584, but the same exemption can be achieved under *Internal Revenue Code of 1954* Section 851, by registering the fund under the Investment Company Act, as did Citibank.[22] Thus, a holding that Citibank's fund is not subject to the Glass-Steagall Act because of the controls imposed by Regulation 9 might require the courts to make a case-by-case appraisal of the nature of the regulatory controls imposed upon each state bank which seeks to organize such a fund.[23]

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[22] See Pet. Br. 7-8.

[23] There are further difficulties with reliance upon Regulation 9. The American Bankers Association has indicated that banks could be prevented from turning commingled managing agency accounts into a mutual fund if they were not permitted to accept investments of less than $10,000 or make portfolio valuations more frequently than once a month. Harris, *Trust Division Annual Report*, TRUST BULL., Oct. 1965, at 13, 18. Regulation 9 contains neither of these restrictions. The Regulation does not specify the minimum amount of participation. There is at least one

C. Respondents' reliance (and that of the court below—A. 266) on the supposed unanimity of views of the federal agencies involved as proof "that the public interest will be served" by permitting banks to operate mutual funds (Citibank Br. 27) has since misfired. The SEC now refuses to defend in this Court its earlier decision granting Citibank's application for Investment Company Act exemptions. The government says these exemptions are essential to the operation of such a fund under the banking laws (Brief for United States as Amicus Curiae at 3, 8-9, *National Ass'n of Securities Dealers* v. *S.E.C.*, U.S. Sup. Ct. No. 59, October Term, 1970). Quite apart from the extraordinary appearance of the United States as amicus to defend what may be described as the "ghost of SEC past," the significance of the situation is that the SEC seems to want a free hand to consider *de novo* the issues involved in the various bank applications for similar exemptions now pending before the agency. These are being held in abeyance pending the outcome of this proceeding (see Brief for Corporate Fiduciaries Association as Amicus Curiae at 4, this case).

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pending application by a state bank before the SEC which provides for a minimum of $1,000. Application for a 6(c) exemption by Security Trust Company, Rochester, New York, dated July 14, 1970, SEC File 812-7802. See also Compt. Br. 7 n.5. Nor does the regulation control the maximum frequency of valuations, which of course determines the ease with which entry into and withdrawal from the fund may be made. The regulation only covers the *minimum* frequency of valuations, which it sets at not less than once each three months. 12 C.F.R. § 9.18(b)(4) (1963, as amended). The Citibank prototype fund permits *daily* valuations (A. 148-49, 150-51).

IV.

Petitioners have standing to challenge the Comptroller's authority to permit banks to engage in the mutual fund business.

The Comptroller also argues that petitioners have no "standing" to challenge his authorization of bank entry into the mutual fund business.[24] Both the District Court (A. 225) and the Court of Appeals (A. 266) rejected this contention. In the Court of Appeals, Judge Bazelon found that the petitioners had standing; the "doubts" of the two remaining judges were "resolved in favor of reaching the merits in cases of this consequence" (A. 266) and they concurred in the result of Judge Bazelon's "opinion which holds that [petitioners] have standing" (A. 309).

This Court has, in a consistent course of recent decisions, liberalized the doctrine of standing, which had previously been applied to bar injured persons from challenging allegedly illegal governmental actions. See *Data Processing Service* v. *Camp,* 397 U.S. 150 (1970); *Barlow* v. *Collins,* 397 U.S. 159 (1970); *Flast* v. *Cohen,* 392 U.S. 83 (1968); *Hardin* v. *Kentucky Utilities Co.,* 390 U.S. 1 (1968). These decisions reflect the "trend . . . toward enlargement of the class of people who may protest administrative action." *Data Processing Service* v. *Camp,* 397 U.S. at 154. Recently, this Court expressly discarded the "legal interest" test as a condition of standing, which had long served as the basis for Government arguments to foreclose judicial review of allegedly unlawful Government action.[25]

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[24] The practical consequences of the Comptroller's position is that his conduct even if unlawful, is unreviewable, since petitioners are the only likely parties to challenge the validity of the Regulation.

[25] The Comptroller makes the curious argument that, although the *Data Processing* case discarded the "legal interest" test as a

Petitioners meet the prerequisites for standing set forth in the *Data Processing* case. *First,* the challenged actions of the Comptroller unquestionably will cause "injury in fact." 397 U.S. at 152. On the basis of undisputed facts, the District Court found that petitioners "would suffer serious and irreparable injury by reason of the establishment and operation of managing agency collective investment funds pursuant to provisions of 12 C.F.R. §9 . . ." (A. 256). The Comptroller has predicted that hundreds of banks might operate bank mutual funds, *1963 Hearing, supra* note 4, at 53, and that in the next decade commercial banks operating under the challenged regulations "might capture as much as two billion dollars of mutual fund business" (A. 218). Respondents have not challenged this showing of "injury in fact." [26]

Second, petitioners' prayer for the consistent application of the Glass-Steagall Act to maintain the established separation of commercial banking from the securities business cannot seriously be doubted to fall "arguably within the zone of interests to be protected or regulated by the

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prerequisite to standing, the same standard nevertheless should be resurrected as a condition to granting relief, even where a proper plaintiff with standing has demonstrated that a challenged governmental act is illegal and has caused him injury in fact. (Compt. Br. 21). This contention misinterprets a comment from the *Data Processing* case that "the 'legal interest' test goes to the merits." 397 U.S. at 153. Petitioners believe that statement merely reflected the well-recognized view that the application of the "legal interest" test had previously involved an analysis of the ultimate merits of the case in the determination whether a particular plaintiff had a "legally protected" interest, and thereby had standing to sue. See *Scanwell Laboratories, Inc.* v. *Shaffer,* 424 F.2d 859 (D.C. Cir. 1970); 3 DAVIS, ADMINISTRATIVE LAW 217 (1958).

[26] In the view of Justices Brennan and White, a showing of "injury in fact" is a sufficient basis to hold that petitioners have standing to sue. See *Barlow* v. *Collins,* 397 U.S. at 167, 168 (concurring opinion).

statute . . . in question." 397 U.S. at 153. As we have previously pointed out (Pet. Br. 11, 29), for more than 30 years the relationships between mutual funds and commercial banks have been restricted by the very sections of the Glass-Steagall Act at issue in this case. Section 32 of the Glass-Steagall Act, 12 U.S.C. § 78, has consistently been applied to prohibit any interlocking relationships between mutual funds and commercial banks. Mutual funds are required by law to have a certain number of unaffiliated directors on their boards of directors. Investment Company Act Section 10(a), 15 U.S.C. § 80a-10(a). A large pool of qualified persons who serve as bank directors have been barred from serving on the boards of mutual funds because, as the Federal Reserve Board has repeatedly held, this interlocking relationship constitutes a violation of Glass-Steagall. See 27 FED. RES. BULL. 399 (1941); 36 FED. RES. BULL. 645 (1951); A. 171; Citibank Br. 56 n.53. In affirming this position in its most recent ruling, the Board stated that it "continues to be of the opinion that the ordinary open-end investment company must be regarded as an organization of the kind described in Section 32 of the Banking Act of 1933" (A. 172).

Even more germane, however, is the fact that, as the Comptroller would be the first to assert, Section 21 of the Glass-Steagall Act, 12 U.S.C. § 378, prohibits an ordinary mutual fund from "engaging in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor," *i.e.*, the business of commercial banking. Accordingly, mutual funds are squarely within the zone of interests "regulated" by the

Glass-Steagall Act, within the meaning of this Court's decision in *Data Processing*.[27]

Since the issue here turns on a statute designed to sever—and keep separate—two distinct industries, the decision of this Court in *American Trucking Ass'ns* v. *United States*, 364 U.S. 1 (1960), is particularly apposite. There, certain motor carriers challenged the lawfulness of a grant by the ICC of operating authority to a subsidiary of a railroad which permitted it to offer motor carrier services. This Court's opinion reflected that "Congress has expressed a strong general policy against railroad invasion of the motor carrier field," 364 U.S. at 6, and found that plaintiffs had standing to challenge the Commission's violation of these Congressional policies which had the effect of creating new illegal competition.

Third, there can be no serious claim that "judicial review of the Comptroller's action has been precluded" under any relevant statute. *Data Processing Service* v. *Camp*, 397 U.S. at 156.[28] There are no provisions in the Glass-Steagall Act or in the other national banking laws which indicate that Congress intended to foreclose judicial re-

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[27] It is noteworthy that, in *Data Processing Service* v. *Camp*, in determining the "zone of interests" the Court did not refer to any legislative background of the Act because such a consideration would "implicate the merits" of the case. 397 U.S. at 156. In resolving this issue, the Court looked no further than the face of the two statutory provisions in question. It noted that neither act "in terms protect[s] a specific group." *Id.* at 157. The Court stated that, nevertheless, the "general policy is apparent; and those whose interests are directly affected by a broad or narrow interpretation of the Act are all easily identifiable." *Id.* This same analysis is equally applicable here.

[28] The Administrative Procedure Act provides that the judicial review provisions of that Act apply "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701, Supp. V, 1970.

view of the Comptroller's actions. The presumption favors judicial review, *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967), and a variety of the Comptroller's decisions have been subject to judicial review.[29]

Indeed, Section 702 of the Administrative Procedure Act[30] provides an independent basis for judicial review for petitioners who are "adversely affected" and suffer "injury in fact" as a result of allegedly illegal agency action. See *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F.2d 859, 865, 870, 872 (D.C. Cir. 1970); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 465-468 (1970); *cf. Data Processing Service* v. *Camp*, 397 U.S. at 157.

In sum, petitioners' suit is the only realistic means of reviewing the Comptroller's actions challenged here. The Glass-Steagall Act has separated commercial banking from the mutual fund business, and its prohibitions have been applied repeatedly to bar members of the mutual fund industry from expanding into commercial banking. The case arose in a context involving an actual collective investment fund created pursuant to an allegedly unlawful regulation of the Comptroller which would now permit commercial banks to expand into the mutual fund business. Under recognized criteria, there can be no doubt that petitioners have standing to challenge the Comptroller's regulations.

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[29] See Pet. Br. 7 n. 6.

[30] Section 702 provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702, Supp. V, 1970.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the cause should be remanded to that Court to enter judgment affirming the judgment of the District Court.

Respectfully submitted,

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November 20, 1970

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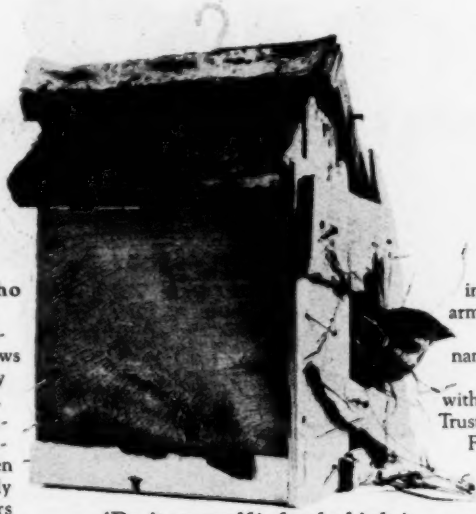

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APPENDIX B

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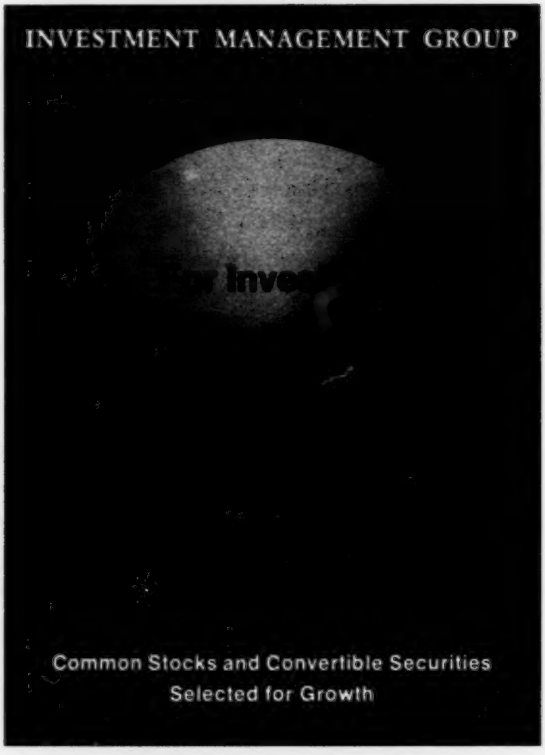

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

INVESTMENT COMPANY INSTITUTE ET AL. *v.* CAMP, COMPTROLLER OF THE CURRENCY, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 61. Argued December 15, 1970—Decided April 5, 1971*

Petitioners in No. 61, an association of open-end investment companies and several individual such companies, attack (1) portions of the Comptroller of the Currency's Regulation 9, purporting to authorize banks to operate collective investment funds, as violative of the Glass-Steagall Banking Act of 1933 and (2) the Comptroller's approval given First National City Bank to operate a collective investment fund. Petitioner in No. 59 seeks review of a Securities and Exchange Commission (SEC) order exempting that fund from certain provisions of the Investment Company Act of 1940. The District Court concluded in No. 61 that the challenged provisions of Regulation 9 were invalid. The Court of Appeals, after consolidating the cases, held that the Comptroller's and the SEC's actions were consonant with the relevant statutes, and affirmed the SEC's order and reversed the District Court. *Held:*

1. Petitioners in No. 61 do not lack standing to challenge whether national banks may legally enter a field in competition with them. *Data Processing Service* v. *Camp*, 397 U. S. 150. P. 3.

2. The operation of a collective investment fund of the kind approved by the Comptroller, that is in direct competition with the mutual fund industry, involves a bank in the underwriting, issuing,

*Together with No. 59, *National Association of Securities Dealers, Inc.* v. *Securities and Exchange Commission et al.*, argued December 14–15, 1970, also on certiorari to the same court.

Syllabus

selling, and distributing of securities in violation of §§ 16 and 21 of the Glass-Steagall Act. Pp. 4–22.

420 F. 2d 83, judgment reversed in No. 61, and vacated in No. 59.

STEWART, J., delivered the opinion of the Court, in which BLACK, DOUGLAS, BRENNAN, WHITE, and MARSHALL, JJ., joined. HARLAN, J., and BLACKMUN, J., filed dissenting opinions. BURGER, C. J., took no part in the consideration or decision of these cases.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 61 & 59.—October Term, 1970

Investment Company Institute et al., Petitioners, 61 v. William B. Camp, Comptroller of The Currency, et al. National Association of Securities Dealers, Inc., Petitioner, 59 v. Securities and Exchange Commission et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[April 5, 1971]

Mr. Justice Stewart delivered the opinion of the Court.

These companion cases involve a double-barreled assault upon the efforts of a national bank to go into the business of operating a mutual investment fund. The petitioners in No. 61 are an association of open-end investment companies and several individual such companies. They brought an action in the United States District Court for the District of Columbia, attacking portions of Regulation 9 issued by the Comptroller of the Currency,[1] on the ground that this Regulation, in purporting to authorize banks to establish and operate collective investment funds, sought to permit activities prohibited to national banks or their affiliates by various provisions of the Glass-Steagall Banking Act of 1933.[2] The peti-

[1] 12 CFR Pt. 9 (1970).

[2] The provisions of the Glass-Steagall Act are codified in various sections scattered through Title 12 of the United States Code.

tioners also specifically attacked the Comptroller's approval of the application of First National City Bank of New York for permission to establish and operate a collective investment fund. In No. 59 the National Association of Securities Dealers filed a petition in the United States Court of Appeals for the District of Columbia Circuit seeking review of an order of the Securities and Exchange Commission that partially exempted the collective investment fund of First National City Bank of New York from various provisions of the Investment Company Act of 1940.[3]

In No. 61 the District Court concluded that the challenged provisions of Regulation 9 were invalid under the Glass-Steagall Act.[4] The Comptroller and First National City Bank appealed from this decision, and the appeal was consolidated with the petition for review in No. 59. The Court of Appeals held that the actions taken by the Securities and Exchange Commission and the Comptroller were fully consonant with the statutes committed to their regulatory supervision. Accordingly, it affirmed the order of the Commission and reversed the judgment of the District Court.[5] We granted certiorari to consider important questions presented under federal regulatory statutes.[6] For the reasons that follow, we hold Regulation 9 invalid insofar as it authorizes the sale of interests in an invstment fund of the type established by First National City Bank pursuant to the Comptroller's approval. This disposition makes it unnecessary to consider the propriety of the action of the Securities and Exchange Commission in affording this fund exemption

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[3] The exemption was granted in response to an application filed pursuant to § 6 (c) of the Act, 15 U. S. C. § 80a–6 (c).

[4] 274 F. Supp. 624.

[5] 420 F. 2d 83.

[6] 397 U. S. 986.

from certain of the provisions of the Investment Company Act of 1940.

I

In No. 61 it is urged at the outset that petitioners lack standing to question whether national banks may legally enter a field in competition with them. This contention is foreclosed by *Data Processing Service* v. *Camp*, 397 U. S. 150. There we held that companies that offered data processing services to the general business community had standing to seek judicial review of a ruling by the Comptroller that national banks could make data processing services available to other banks and to bank customers. We held that data processing companies were sufficiently injured by the competition that the Comptroller had authorized to create a case or controversy. The injury to the petitioners in the instant case is indistinguishable. We also concluded that Congress did not intend "to preclude judicial review of administrative rulings by the Comptroller as to the legitimate scope of activities available to national banks under [the National Bank Act]." 397 U. S., at 157. This is precisely the review that the petitioners have sought in this case. Finally, we concluded that Congress had arguably legislated against the competition that the petitioners sought to challenge, and from which flowed their injury. We noted that whether Congress had indeed prohibited such competition was a question for the merits. In the discussion that follows in the balance of this opinion we deal with the merits of the petitioners' contentions and conclude that Congress did legislate against the competition that the petitioners challenge. There can be no real question, therefore, of the petitioners' standing in the light of the *Data Processing* case. See also *Arnold Tours* v. *Camp*, 400 U. S. 45.

II

The issue before us is whether the Comptroller of the Currency may, consistently with the banking laws, authorize a national bank to offer its customers the opportunity to invest in a stock fund created and maintained by the bank. Before 1963 national banks were prohibited by administrative regulation from offering this service. The Board of Governors of the Federal Reserve, which until 1962 had regulatory jurisdiction over all the trust activities of national banks, allowed the collective investment of trust assets only for "the investment of funds held for true fiduciary purposes." The applicable regulation, Regulation F, specified that "the operation of such Common Trust Funds as investment trusts for other than strictly fiduciary purposes is hereby prohibited." The Board consistently ruled that it was improper for a bank to use "a Common Trust Fund as an investment trust attracting money seeking investment alone and to embark upon what would be in effect the sale of participations in a Common Trust Fund to the public as investments." 26 Fed. Res. Bull. 393 (1940); see also 42 Fed. Res. Bull. 228 (1956); 41 Fed. Res. Bull. 142 (1955).

In 1962 Congress transferred jurisdiction over most of the trust activities of national banks from the Board of Governors of the Federal Reserve to the Comptroller of the Currency, without modifying any provision of substantive law. Public Law 87–722, 76 Stat. 668, 12 U. S. C. § 92 (a). The Comptroller thereupon solicited suggestions for improving the regulations applicable to trust activities. Subsequently new regulations were proposed which expressly authorized the collective investment of monies delivered to the bank for investment management, so-called managing agency accounts. These proposed regulations were officially promulgated in 1963 with

changes not material here.[7] In 1965 the First National City Bank of New York submitted for the Comptroller's approval a plan for the collective investment of managing agency accounts. The Comptroller promptly approved the plan, and it is now in operation. This plan, which departs in some respects from the plan envisaged by the Comptroller's Regulation, is expected, the briefs tell us, to be a model for other banks which decide to offer their customers a collective investment service.[8]

Under the plan the bank customer tenders between $10,000 and $500,000 to the bank, together with an authorization making the bank the customer's managing agent. The customer's investment is added to the fund, and a written evidence of participation is issued which expresses in "units of participation" the customer's proportionate interest in fund assets. Units of participation are freely redeemable, and transferable to anyone who has executed a managing agency agreement with the bank. The fund is registered as an investment company under the Investment Company Act of 1940. The bank is the underwriter of the fund's units of participation within the meaning of that Act. The fund has filed a registration statement pursuant to the Securities Act of 1933. The fund is supervised by a five-member committee elected annually by the participants pursuant to the Investment Company Act of 1940. The Securities and Exchange Commission has exempted the fund from the

[7] 12 CFR § 9.18 (a) (3) provides that "Where not in contravention of local law, funds held by a national bank as fiduciary may be invested collectively in a common trust fund, maintained by the bank exclusively for the collective investment and reinvestment of monies contributed thereto by the bank in its capacity as managing agent under a managing agency agreement expressly providing that such monies are received by the bank in trust . . . ."

[8] For example, the investment fund plan as established does not provide that the bank receives the investor's money in trust.

Investment Company Act to the extent that a majority of this committee may be affiliated with the bank, and it is expected that a majority always will be officers in the bank's trust and investment division.[9] The actual custody and investment of fund assets is carried out by the bank as investment advisor pursuant to a management agreement. Although the Investment Company Act requires that this management agreement be approved annually by the committee, including a majority of the unaffiliated members, or by the participants, it is expected that the bank will continue to be investment advisor.

II

Section 16 of the Glass-Steagall Act as amended, 12 U. S. C. § 24, provides that the "business of dealing in securities and stock [by a national bank] shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account . . . . Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by [a national bank] for its own account of any shares of stock of any corporation." [10] The petitioners contend that a purchase of stock by a bank's investment fund is a purchase of stock by a bank for its own account in violation of this section.

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[9] The opinion of the Commission and the dissent of Commissioner Budge are unofficially reported at CCH Fed. Sec. L. Rept., 1964–1966 Decisions, ¶ 92,438.

[10] Section 16, as enacted in 1933, granted no authority to purchase stock for the account of customers and prohibited any purchase of stock by a national bank. The 1935 Amendments to the National Bank Act included a provision intended to make it clear that a national bank may buy stock for the account of customers but not for its own account. S. Rep. No. 1007, 74th Cong., 1st Sess., p. 17; H. R. Rep. No. 742, 74th Cong., 1st Sess., p. 18.

Section 16 also provides that a national bank "shall not underwrite any issue of securities or stock." And § 21 of the same Act, 12 U. S. C. § 378, provides that "it shall be unlawful for any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of [deposit banking]." The petitioners contend that the creation and operation of an investment fund by a bank which offers to its customers the opportunity to purchase an interest in the fund's assets constitutes the issuing, underwriting, selling or distributing of securities or stocks in violation of these sections.

The questions raised by the petitioners are novel and substantial. National Banks were granted trust powers in 1915. Federal Reserve Act, c. 6, § 11, 38 Stat. 261. The first common trust fund was organized in 1927, and such funds were expressly authorized by the Federal Reserve Board by Regulation F promulgated in 1937. Report on Commingled or Common Trust Funds Administered by Banks and Trust Companies, H. Doc. No. 476, 76th Cong., 2d Sess. 4–5 (1939). For at least a generation, therefore, there has been no reason to doubt that a national bank can, consistently with the banking laws, commingle trust funds on the one hand, and act as a managing agent on the other. No provision of the banking law suggests that it is improper for a national bank to pool trust assets, or to act as a managing agent for individual customers, or to purchase stock for the account of its customers. But the union of these powers gives birth to an investment fund whose activities are of a different character. The differences between the investment fund which the Comptroller has authorized and a

conventional open-end mutual fund are subtle at best, and it is undisputed that this bank investment fund finds itself in direct competition with the mutual fund industry. One would suppose that the business of a mutual fund consists of buying stock "for its own account" and of "issuing" and "selling" "stock" or "other securities" evidencing an undivided and redeemable interest in the assets of the fund.[11] On their face, §§ 16 and 21 of the Glass-Steagall Act appear clearly to prohibit this activity by national banks.[12]

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[11] A mutual fund is an open-end investment company. The Investment Company Act of 1940 defines an investment company as an "issuer" of "any security" which "is or holds itself out as being engaged primarily . . . in the business of investing . . . in securities . . . ." 15 U. S. C. §§ 80a–2 (21), 80a–3 (a)(1). An open-end company is one "which is offering for sale or has outstanding any redeemable security of which it is the issuer." 15 U. S. C. § 80a–5 (a)(1). An investment company also includes a "unit investment trust:" an investment company which, among other things, "is organized under . . . a contract of . . . agency . . . and . . . issues only redeemable securities, each of which represents an undivided interest in a unit of specified securities . . . ." 15 U. S. C. § 80a–4 (2).

[12] Section 20 (a) of the Act, 12 U. S. C. § 377, prohibits affiliations between banks which are members of the Federal Reserve System and organizations "engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes or other securities . . . ." And § 32, 12 U. S. C. § 78, provides that no officer, director, or employee of a bank in the Federal Reserve System may serve at the same time as officer, director, or employee of an association primarily engaged in the activity described in § 20 (a). The petitioners contend that if a bank's investment fund be conceived as an entity distinct from the bank, then its affiliation with the investment fund is in violation of these sections.

The Board of Governors has had occasion to consider whether an investment fund of the type operated by First National City Bank involves a violation of § 32 of the Glass-Steagall Act. 12 CFR § 218.111 (1970). The Board concluded, based on "general principles

But we cannot come lightly to the conclusion that the Comptroller has authorized activity which violates the banking laws. It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of the banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws. See *First National Bank* v. *Missouri*, 263 U. S. 640, 658.

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that have been developed in respect to the application of section 32" that it would not violate that section for officers of the bank's trust department to serve at the same time as officers of the investment fund because the fund and the bank "constitute a single entity," and the fund "would be regarded as nothing more than an arm or department of the bank." The Board called attention to § 21 whose provisions it summarized as forbidding "a securities firm or organization to engage in the business of receiving deposits, subject to certain exceptions." The Board, however, declined to express a position concerning the applicability of this section because of its policy not to express views as to the meaning of statutes which carry criminal penalties. Nor has the Board expressed its views on the application of any other provision of the banking law to the creation and operation of a bank investment fund.

We have no doubt but that the Board's construction and application of § 32 is both reasonable and rational. The investment fund service authorized by the Comptroller's regulation and as provided by the First National City Bank is a service available only to customers of the bank. It is held out as a service provided by the bank, and the investment fund bears the bank's name. The bank has effective control over the activities of the investment fund. Moreover, there is no danger that to characterize the bank and its fund as a single entity will disserve the purpose of Congress. The limitations which the banking laws place on the activities of national banks are at least as great as the limitations placed on the activities of their affiliates. For example, § 32 refers to the "public sale" of stocks or securities while § 21 proscribes the "selling" of stocks or securities.

The difficulty here is that the Comptroller adopted no expressly articulated position at the administrative level as to the meaning and impact of the provisions of §§ 16 and 21 as they affect bank investment funds. The Comptroller promulgated Regulation 9 without opinion or accompanying statement. His subsequent report to Congress did not advert to the prohibitions of the Glass-Steagall Act. Comptroller of the Currency, 101st Annual Report, 14–15.[13] To be sure, counsel for the Comptroller

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[13] A law review article coauthored by Comptroller Saxon and Deputy Comptroller Miller in 1965 did take the position that the Glass-Steagall Act is inapplicable to bank common trust funds. Saxon and Miller, Common Trust Funds, 53 Geo. L. J. 994 (1965). But this view was predicated on the argument that when Congress in 1936 provided a tax exemption for common trust funds maintained by a bank, now 26 U. S. C. § 584, it contemplated the exemption of common trust funds created for strictly investment purposes, and that consequently Congress must have assumed that the banking laws, which otherwise appear to proscribe such funds, were not applicable. *Id.*, at 1008–1010. Whatever the merits of this argument, it has no bearing on the instant litigation. It is clear that the collective investment funds authorized by Regulation 9 need not qualify for tax exemption under § 584; the First National City Bank Fund does not so qualify. Moreover, the position advanced in the brief filed on behalf of the Comptroller in this litigation is not that the banking laws are inapplicable to bank investment funds, but rather that the creation and operation of such funds are consistent with the banking laws.

It is noteworthy that the § 584 exemption is available to common trust funds "maintained by a bank . . . exclusively for the collective investment and reinvestment of monies contributed thereto by the bank in its capacity as a *trustee, executor, administrator, or guardian* . . . ." (Emphasis added.) This language, which makes no reference to contributions by the bank in its capacity as managing agent, is identical to that exempting such common trust funds from the Investment Company Act of 1940, 15 U. S. C. § 80a–3 (c)(3). The Securities and Exchange Commission has taken the position that commingled managing agency accounts do not come within § 80a–3 (c)(3). See Statement of Commissioner Cary, Hearings on

in the course of this litigation, and specifically in his briefs and oral argument in this Court, has rationalized the basis of Regulation 9 with great professional competence. But this is hardly tantamount to an administrative interpretation of §§ 16 and 21. In *Burlington Truck Lines* v. *United States,* 371 U. S. 156, we said, "The courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . . . For the courts to substitute their or counsel's discretion for that of the [agency] is incompatible with the orderly functioning of the process of judicial review." *Id.,* at 168–169. Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands. It is the administrative official and not appellate counsel who possesses the expertise which can enlighten and rationalize the search for the meaning and intent of Congress. Quite obviously the Comptroller should not grant new authority to national banks until he is satisfied that the exercise of this authority will not violate the intent of the banking laws. If he faces such questions only after he has acted, there is substantial danger that the momentum generated by initial approval may seriously impair the enforcement of the banking laws that Congress enacted.

IV

There is no dispute that one of the objectives of the Glass-Steagall Act was to prohibit commercial banks, banks that receive deposits subject to repayment, lend money, discount and negotiate promissory notes and the like, from going into the investment banking business. Many commercial banks were indirectly engaged in the

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Common Trust Funds—Overlapping Responsibility and Conflict in Regulation, before a Subcommittee of the House Committee on Government Operations, 88th Cong., 1st Sess., at 3 (1963).

investment banking business when the Act was passed in 1933. Even before the passage of the Act it was generally believed that it was improper for a commercial bank to engage in investment banking directly.[14] But in 1908 banks began the practice of establishing security affiliates which engaged in, *inter alia*, the business of floating bond issues and, less frequently, underwriting stock issues.[15] The Glass-Steagall Act confirmed that national banks could not engage in investment banking directly, and in addition made affiliation with an organization so engaged illegal. One effect of the Act was to abolish the security affiliates of commercial banks.[16]

It is apparent from the legislative history of the Act why Congress felt that this drastic step was necessary. The failure of the Bank of United States in 1930 was widely attributed to that bank's activities with respect to its numerous securities affiliates.[17] Moreover, Congress was concerned that commercial banks in general and Federal Reserve Banks in particular had both aggravated and been damaged by stock market decline partly because of their direct and indirect involvement in the trading and ownership of speculative securities.[18] The Glass-Steagall Act reflected a determination that policies of competition, convenience, or expertise which might otherwise support the entry of commercial banks into the

[14] Hearings Pursuant to S. Res. 71 before a Subcommittee of the Senate Committee on Banking and Currency (hereafter 1931 Hearings), 71st Cong., 3d Sess., 40 (1931); 1920 Report of the Comptroller of the Currency, quoted *id.*, at 1067, 1068. Senator Glass, commenting on earlier banking legislation, said, "We tried to, and we thought at the time we had, removed the system as far as possible from the influence of the stock market." *Id.*, at 262.

[15] *Id.*, at 1052.

[16] Report on Investment Trusts and Investment Companies, Pt. II, H. R. Doc. No. 70, 76th Cong., 1st Sess., 59 (1939).

[17] 1931 Hearings, *supra* n. 14, at 116–117, 1017, 1068.

[18] See S. Rep. No. 77, 73d Cong., 1st Sess., 6, 8, 10.

investment banking business were outweighed by the "hazards" and "financial dangers" that arise when commercial banks engage in the activities proscribed by the Act.[19]

The hazards that Congress had in mind were not limited to the obivous danger that a bank might invest its own assets in frozen or otherwise imprudent stock or security investments. For often securities affiliates had operated without direct access to the assets of the bank. This was because securities affiliates had frequently been established with capital paid in by the bank's stockholders, or by the public, or through the allocation of a legal dividend on bank stock for this purpose.[20] The legislative history of the Glass-Steagall Act shows that Congress also had in mind and repeatedly focused on the more subtle hazards that arise when a commercial bank goes beyond the business of acting as fiduciary or managing agent and enters the investment banking business either directly or by establishing an affiliate to hold and sell particular investments. This course places new promotional and other pressures on the bank which in turn create new temptations. For example, pressures are created because the bank and the affiliate are closely associated in the public mind, and should the affiliate fare badly, public confidence in the bank might be impaired. And since public confidence is essential to the solvency of a bank, there might exist a natural temptation to shore up the affiliate through unsound loans or other aid.[21] Moreover,

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[19] *Id.*, at 18; see 1931 Hearings, *supra* n. 14, at 365; 75 Cong. Rec. 9911 (remarks of Senator Buckley) (1932).

[20] 1931 Hearings, *supra* n. 14, at 41, 192, 1056; 1920 Report of the Comptroller of the Currency, quoted *id.*, at 1067.

[21] 1931 Hearings, *supra* n. 14, at 20, 237, 1063. See also *id.*, at 1058, where it is said:

"Activities of a bank's security affiliate as a holding or finance company or an investment trust are also fraught with the danger

the pressure to sell a particular investment and to make the affiliate successful might create a risk that the bank would make its credit facilities more freely available to those companies in whose stock or securities the affiliate has invested or become otherwise involved. Congress feared that banks might even go so far as to make unsound loans to such companies.[22] In any event, it was thought that the bank's salesman's interest impairs its ability to function as an impartial source of credit.[23]

Congress was also concerned that bank depositors might suffer losses on investments that they purchased in reliance on the relationship between the bank and its affiliate.[24] This loss of customer good will might "become an important handicap to a bank during a major period of security market deflation."[25] More broadly, Congress feared that the promotional needs of investment banking might lead commercial banks to lend their reputation for prudence and restraint to the enterprise of selling particular stocks and securities, and that this could not be done without that repuation being undercut by the risks necessarily incident to the investment banking business.[26] There was also perceived the danger that

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of large losses during a deflation period. Bank affiliates of this kind show a much greater tendency to operate with borrowed funds than do organizations of this type which are independent of banks, the reason being that the identity of control and management which prevails between the bank and its affiliate tends to encourage reliance upon the lending facilities of the former."

[22] See *id.*, at 1064; 75 Cong. Rec. 9912 (remarks of Senator Buckley) (1932).

[23] See 1931 Hearings, *supra* n. 14, at 87 (remarks of Chairman Glass).

[24] See 77 Cong. Rec. 4028 (1933) (remarks of Representative Fish).

[25] 1931 Hearings, *supra* n. 14, at 1064.

[26] See 75 Cong. Rec. 9912 (May 10, 1932):

"And although such a loss would possibly not result in any substantial impairment of the resources of the banking institution

when commercial banks were subject to the promotional demands of investment banking, they might be tempted to make loans to customers with the expectation that the loan would facilitate the purchase of stocks and securities.[27] There was evidence before Congress that loans for investment written by commercial banks had done much to feed the speculative fever of the late 1920's.[28] Senator Glass made it plain that it was "the fixed purpose of Congress" not to see the facilities of commercial banking diverted into speculative operations by the aggressive and promotional character of the investment banking business.[29]

Another potential hazard that very much concerned Congress arose from the plain conflict between the promotional interest of the investment banker and the obli-

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owning that affiliate . . . there can be no doubt that the whole transaction tends to discredit the bank and impair the confidence of its depositors." (Remarks of Senator Buckley.)

[27] S. Rep. No. 77, 73d Cong., 1st Sess., 9–10.

[28] 1931 Hearings, *supra* n. 14, at 1006–1029; S. Rep. No. 77, 73d Cong., 1st Sess., 8–9.

[29] 75 Cong. Rec. 9884 (1932). See also S. Rep. No. 77, 73d Cong., 1st Sess., 8:

"The outstanding development in the commercial banking system during the prepanic period was the appearance of excessive security loans, and of overinvestment in securities of all kinds. The effects of this situation in changing the whole character of the banking problem can hardly be overemphasized. National banks were never intended to undertake investment banking business on a large scale, and the whole tenor of legislation and administrative rulings concerning them has been away from recognition of such a growth in the direction of investment banking as legitimate."

In the same vein Representative Steagall said:

"Our great banking system was diverted from its original purpose into investment activities . . . .

. . . . .

"The purpose of the regulatory provisions of this bill is to call back to the service of agriculture and commerce and industry the bank credit and the bank service designed by the framers of the Federal Reserve Act." 77 Cong. Rec. 3835 (1933).

gation of the commercial banker to render disinterested investment advice. Senator Buckley stated:

> "Obviously the banker who has nothing to sell his depositors is much better qualified to advise disinterestedly and to regard diligently the safety of depositors than the banker who uses the list of depositors in his savings department to distribute circulars concerning the advantages of this, that or the other investment on which the bank is to receive an originating profit or an underwriting profit or a distributing profit or a trading profit or any combination of such profits." [30]

Congress had before it evidence that security affiliates might be driven to unload excessive holdings through the trust department of the sponsor bank.[31] Some witnesses at the hearings expressed the view that this practice constituted self-dealing in violation of the trustee's obligation of loyalty, and indeed that it would be improper for a bank's trust department to purchase anything from the bank's securities affiliate.[32]

In sum, Congress acted to keep commercial banks out of the investment banking business largely because it believed that the promotional incentives of investment banking and the investment banker's pecuniary stake in the success of particular investment opportunities was destructive of prudent and disinterested commercial banking and of public confidence in the commercial banking system. As Senator Buckley put it:

> "If we want banking service to be strictly banking service, without expectation of additional profits in selling something to customers, we must keep banks out of the investment security business." [33]

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[30] 75 Cong. Rec. 9912 (1932).

[31] 1931 Hearings, *supra* n. 14, at 237; cf. *id.*, at 1064.

[32] *Id.*, at 266, 300, 311.

[33] 75 Cong. Rec. 9912 (1932).

V

The language that Congress chose to achieve this purpose includes the prohibitions of § 16 that a national bank "shall not underwrite any issue of securities or stock" and shall not purchase "for its own account any shares of stock of any corporation," and the prohibition of § 21 against engaging in "the business of issuing, underwriting, selling or distributing . . . stocks, bonds, debentures, notes, or other securities." In this litigation the Comptroller takes the position that the operation of a bank investment fund is consistent with these provisions, because participating interests in such a fund are not "securities" within the meaning of the Act. It is argued that a bank investment fund simply makes available to the small investor the benefit of investment management by a bank trust department which would otherwise be available only to large investors, and that the operation of an investment fund creates no problems that are not present whenever a bank invests in securities for the account of customers.

But there is nothing in the phrasing of either § 16 or § 21 that suggests a narrow reading of the word "securities." To the contrary, the breadth of the term is implicit in the fact that the antecedent statutory language encompasses not only equity securities but also securities representing debt. And certainly there is nothing in the language of these provisions to suggest that the sale of an interest in the business of buying, holding, and selling stocks for investment is to be distinguished from the sale of an interest in a commercial or industrial enterprise.

Indeed, there is direct evidence that Congress specifically contemplated that the word "security" includes an interest in an investment fund. The Glass-Steagall Act was the product of hearings conducted pursuant to Senate

Resolution 71 which included among the topics to be investigated the impact on the banking system of the formation of investment and security trusts.[34] The subcommittee found that one of the activities in which bank security affiliates engaged was that of an investment trust: "buying and selling securities acquired purely for investment or speculative purposes." [35] Since Congress generally intended to divorce commercial banking from the kinds of activities in which bank security affiliates engaged, there is reason to believe that Congress explicitly intended to prohibit a national bank from operating an investment trust.[36]

But in any event we are persuaded that the purposes for which Congress enacted the Glass-Steagall Act leave no room for the conclusion that a participation in a bank investment fund is not a "security" within the meaning of the Act. From the perspective of competition, convenience, and expertise, there are arguments to be made in support of allowing commercial banks to enter the investment banking business. But Congress determined that the hazards outlined above made it necessary to prohibit this activity to commercial banks. Those same hazards are clearly present when a bank undertakes to operate an investment fund.

A bank that operates an investment fund has a particular investment to sell. It is not a matter of indifference to the bank whether the customer buys an interest in the fund or makes some other investment. If its customers cannot be persuaded to invest in the bank's investment fund, the bank will lose their investment

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[34] S. Res. 71, 71st Cong., 2d Sess., is reprinted in S. Rep. No. 77, 73d Cong., 1st Sess., at 1.

[35] 1931 Hearings, *supra* n. 14, at 1057. See also *id.*, at 307.

[36] See also *supra*, n. 21.

business and the fee which that business would have brought in. Even as to accounts large enough to qualify for individual investment management, there might be a potential for a greater profit if the investment were placed in the fund rather than in individually selected securities, because of fixed costs and economies of scale. The mechanics of operating an investment fund might also create promotional pressure. When interests in the fund were redeemed, the bank would be effectively faced with the choice of selling stocks from the fund's portfolio or of selling new participations to cover redemptions. The bank might have a pecuniary incentive to choose the latter course in order to avoid the cost of stock transactions undertaken solely for redemption purposes.

Promotional incentives might also be created by the circumstance that the bank's fund would be in direct competition with mutual funds that, from the point of view of the investor, offered an investment opportunity comparable to that offered by the bank. The bank would want to be in a position to show to the prospective customer that its fund was more attractive than the mutual funds offered by others. The bank would have a salesman's stake in the performance of the fund, for if the fund were less successful than the competition the bank would lose business and the resulting fees.

A bank that operated an investment fund would necessarily put its reputation and facilities squarely behind that fund and the investment opportunity which the fund offered. The investments of the fund might be conservative or speculative, but in any event the success or failure of the fund would be a matter of public record. Imprudent or unsuccessful management of the bank's investment fund could bring about a perhaps unjustified loss of public confidence in the bank itself. If imprudent management should place the fund in distress, a

bank might find itself under pressure to rescue the fund through measures inconsistent with sound banking.

The promotional and other pressures incidental to the operation of an investment fund, in other words, involve the same kinds of potential abuses that Congress intended to guard against when it legislated against bank security affiliates. It is not the slightest reflection on the integrity of the mutual fund industry to say that the traditions of that industry are not necessarily the conservative traditions of commercial banking. The needs and interests of a mutual fund enterprise more nearly approximate those of securities underwriting, the activity in which bank security affiliates were primarily engaged. When a bank puts itself in competition with mutual funds, the bank must make an accommodation to the kind of ground rules that Congress firmly concluded could not be prudently mixed with the business of commercial banking.

And there are other potential hazards of the kind Congress sought to eliminate with the passage of the Glass-Steagall Act. The bank's stake in the investment fund might distort its credit decisions or lead to unsound loans to the companies in which the fund had invested. The bank might exploit its confidential relationship with its commercial and industrial creditors for the benefit of the fund. The bank might undertake, directly or indirectly, to make its credit facilities available to the fund or to render other aid to the fund inconsistent with the best interests of the bank's depositors. The bank might make loans to faciltate the purchase of interests in the fund. The bank might divert talent and resources from its commercial banking operation to the promotion of the fund. Moreover, because the bank would have a stake in a customer's making a particular investment decision—the decision to invest in the bank's investment fund—the customer might doubt the motivation behind the bank's recommendation that he

make such an investment. If the fund investment should turn out badly there would be a danger that the bank would lose the good will of those customers who had invested in the fund. It might be unlikely that disenchantment would go so far as to threaten the solvency of the bank. But because banks are dependent on the confidence of their customers, the risk would not be unreal.

These are all hazards that are not present when a bank undertakes to purchase stock for the account of its individual customers or to commingle assets which it has received for a true fiduciary purpose rather than for investment. These activities, unlike the operation of an investment fund, do not give rise to a promotional or salesman's stake in a particular investment; they do not involve an enterprise in direct competition with aggressively promoted funds offered by other investment companies; they do not entail a threat to public confidence in the bank itself; and they do not impair the bank's ability to give disinterested service as a fiduciary or managing agent. In short, there is a plain difference between the sale of fiduciary services and the sale of investments.[37]

VI

The Glass-Steagall Act was a prophylactic measure directed against conditions which the experience of the 1920's showed to be great potentials for abuse. The literal terms of that Act clearly prevent what the Comptroller has sought to authorize in this case. Because the potential hazards and abuses that flow from a bank's entry into the mutual investment business are the same basic hazards and abuses that Congress intended to eliminate almost 40 years ago, we cannot but apply the terms of the federal statute as they were written. We conclude that the operation of an investment fund

[37] See 26 Fed. Res. Bull. 393 (1940), quoted *supra*, p. [4].

of the kind approved by the Comptroller involves a bank in the underwriting, issuing, selling and distributing of securities in violation of §§ 16 and 21 of the Glass-Steagall Act. Accordingly, we reverse the judgment in No. 61 and vacate the judgment in No. 59.

It is so ordered.

THE CHIEF JUSTICE took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES

Nos. 61 & 59.—October Term, 1970

Investment Company Institute et al., Petitioners, 61 *v.* William B. Camp, Comptroller of The Currency, et al. National Association of Securities Dealers, Inc., Petitioner, 59 *v.* Securities and Exchange Commission et al.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia.

[April 5, 1971]

Mr. Justice Harlan, dissenting.

The Court holds that the Investment Company Institute has standing as a competitor to challenge the action of the Comptroller of the Currency because Congress "arguably legislated against the competition that the petitioners sought to challenge, and from which flowed their injury." The ICI, says the Court, is entitled to prevail because "Congress *did* legislate against the competition that the petitioners challenge." *Ante*, at 3 (emphasis added). I understand the Court to mean by "legislated against the competition" not only that Congress prohibited banks from entering this field of endeavor, but that it did so in part for reasons stemming from the fact of the resulting competition. See pp. 14–16, 19–21, *ante*. However, the Court cannot mean by this phrase that it was Congress' purpose to protect petitioners' class against competitive injury for, as all three judges on the court below agreed, neither the language of the pertinent provisions of the Glass-Steagall Act nor the legislative his-

tory evinces any congressional concern for the interests of petitioners and others like them in freedom from competition.[1] Indeed, it appears reasonably plain that, if anything, the Act was adopted despite its anticompetitive effects rather than because of them. Cf. pp. 12–13, 18, *ante*.

This being the case, the discussion of standing in *Hardin* v. *Kentucky Utilities Co.*, 390 U. S. 1, 5–6 (1968), is directly in point:

> "This Court has, it is true, repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations. *Railroad Co.* v. *Ellerman*, 105 U. S. 166 (1882); *Alabama Power Co.* v. *Ickes*, 302 U. S. 464 (1938); *Tennessee Power Co.* v. *TVA*, 306 U. S. 118 (1939); *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113 (1940). But competitive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury. In contrast, it has been the rule, at least since the *Chicago Junction Case*, 264 U. S. 258 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision."

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[1] "It is equally clear that giving even the broadest reading of the legislative history embellishing the Act will not support the conclusion that Congress meant to bestow upon Appellees any protection from competitive injury." 420 F. 2d, at 105 (Burger, J., joined by Miller, J.) (footnote omitted); see also *id.*, at 96, 98–100 (Bazelon, C. J.).

I do not believe that *Association of Data Processing Service Organizations* v. *Camp,* 397 U. S. 150 (1970), and *Arnold Tours* v. *Camp,* 400 U. S. 45 (1970), require the opposite result from the one suggested by this passage from *Hardin.* *Data Processing* held that, aside from "case-or-controversy" problems not present here, the crucial question in ruling on a challenge to standing is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U. S., at 153. That question was resolved in favor of the Data Processors because "§ 4 [of the Bank Service Corporation Act] arguably brings a competitor within the zone of interests protected by it." *Id.,* at 156.[2] In *Arnold Tours* the Court observed that it was again dealing with § 4 of the Bank Service Corporation Act, and that "[n]othing in the [*Data Processing*] opinion limited § 4 to protecting only competitors in the data-processing field." 400 U. S., at 46. Plainly these cases provide little support for the Court's conclusion here that competitors, *as such,* have standing under the Glass-Steagall Act as well.

The Court's holding—that if Congress prohibited entry into a field of business for reasons relating to competition, then a competitor has standing to seek observance of the prohibition—has a surface appeal, but, so far as I can see, no sound analytical basis. Certainly none is offered. In any event it appears to me that our prior decisions, particularly *Hardin,* require the conclusion that the petitioners in No. 61 lack standing to challenge the Comptroller's action. While I would not foreclose the possibility that those cases should be further modified in some respect,[3] the Court has not undertaken to re-

[2] See also *Barlow* v. *Collins,* 397 U. S. 159, 164 (1970).

[3] For one suggestion to this effect, see Jaffe, Standing Again, 84 Harv. L. Rev. 633 (1971).

examine them, and I deem it inappropriate for me to do so as a single Justice.

The view that I take with regard to petitioners' standing in No. 61 makes it unnecessary for me to reach the merits in that case, but it does require me to rule on the contentions made in No. 59. Like MR. JUSTICE BLACKMUN, see p. 4, *post*, I find lengthy discussion of this topic superfluous. At issue is the propriety of the action of the Securities and Exchange Commission in increasing from two to three the number of seats open to bank officers on the five-man committee which serves as a board of directors of the account.[4] Substantially for the reasons given by the judges of the court below, 420 F. 2d, at 91–95, 108, I am of the opinion that the Commission did not abuse its discretion in determining that the facts of this case made appropriate an exercise of the dispensing power explicitly vested in the Commission by 15 U. S. C. § 80a–6 (c).

For the reasons given herein, I would affirm the two judgments under review.

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[4] By virtue of the "person or party aggrieved" provision of the Investment Company Act, 15 U. S. C. § 80a–42 (a), there is no difficulty supporting petitioner's standing in No. 59.

SUPREME COURT OF THE UNITED STATES

Nos. 61 & 59.—October Term, 1970

Investment Company Institute et al., Petitioners, 61 *v.* William B. Camp, Comptroller of The Currency, et al. National Association of Securities Dealers, Inc., Petitioner, 59 *v.* Securities and Exchange Commission et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[April 5, 1971]

Mr. Justice Blackmun, dissenting.

The Court's opinion and judgment here, it seems to me, are based more on what is deemed to be appropriate and desirable national banking *policy* than on what is a necessary judicial construction of the Glass-Steagall Act of almost four decades ago. It is a far different thing to be persuaded that it is wise policy to keep national banks out of the business of operating mutual investment funds, despite the safeguards which the Comptroller of the Currency and the Securities and Exchange Commission have provided, than it is to be persuaded that existing and somewhat ancient legislation requires that result. Policy considerations are for the Congress and not for this Court.

I recognize and am fully aware of the factors and of the economic considerations that led to the enactment of the Glass-Steagall Act. The second decade of this century is not the happiest chapter in the history of American banking. Deep national concerns emerged

from the distressful experiences of those years and from the sad ends to which certain banking practices of that time had led the industry. But those then prevailing conditions, the legislative history, and the remedy Congress provided, prompt me to conclude that what was proscribed was the involvement and activity of a national bank in investment, as contrasted with commercial, banking, in underwriting and issuing, and in acquiring speculative securities for its own account. These were the banking sins of that time.

The propriety, however, of a national bank's acting, when not in contravention of state or local law, as an *inter vivos* or testamentary trustee, as an executor or administrator, as a guardian or committee, as a custodian, and, indeed, as an agent for the individual customer's securities and funds, see *Carcaba* v. *McNair*, 68 F. 2d 795, 797 (CA5 1934), cert. denied, 292 U. S. 646, is not, and could not be, questioned by the petitioners here or by the Court. This being so, there is, for me, an element of illogic in the ready admission by all concerned, on the one hand, that a national bank has the power to manage, by way of a common trust arrangement, those funds that it holds as fiduciary in the technical sense, and to administer separate agency accounts, and in the rejection, on the other hand, of the propriety of the bank's placing agency assets into a mutual investment fund. The Court draws its decisional line between the two. I find it impossible to locate any statutory root for that line drawing. To use the Glass-Steagall Act as a tool for that distinction is, I think, a fundamental misconception of the statute.

Accordingly, I am not convinced that the Congress, by that Act or otherwise, as yet has proscribed the banking endeavors under challenge here by competitors in a highly competitive field. None of the judges of the Court of Appeals was so convinced, and neither was the

Comptroller of the Currency whose expertise the Court concedes. I would leave to Congress the privilege of now prohibiting such national bank activity if that is its intent and desire.

In Parts IV and V of its opinion the Court outlines hazards that are present when a bank indulges in specified activities. The Court then states, in the last paragraph of Part V, that those hazards are not present when a bank undertakes to purchase stock for individual customers, or to commingle assets held in its several fiduciary capacities, and the like. I must disagree. It seems to me that exactly the same hazards are indeed present. A bank offers its fiduciary services in an atmosphere of vigorous competition. One need only observe the current and continuous advertising of claimed fiduciary skills to know that this is so and that the business is one for profit. In the fiduciary area a bank is engaged in direct competition with other investment concepts and with nonbanking fiduciaries. Failure or misadventure of a single trust may constitute a theat to public confidence among the bank's other trust beneficiaries, prospective trustors, and even the commercial activities of the bank itself. It has an inevitable adverse effect upon the bank's fulfillment of what is fashionably described today as its "full service."

Thus I feel that the Court overstates its case when it seeks to diminish the significance of these hazards in the fiduciary area as contrasted with mutual fund operation. After all, we deal here with something akin to the traditional banking function and with a device that makes available for the small investor what is already available for the large investor by way of the individual agency account.

What the Court decries in the investment fund is the combination of three banking operations, each concededly permissible: acting as agent for the customer, purchasing for that customer, and pooling assets. It is said that

"the union of these powers" gives birth to something "of a different character" and is statutorily prohibited. I doubt that those three powers, each allowed by the controlling statutes, somehow operate in combination to produce something forbidden by those same controlling statutes, and I doubt that the unitization is something more or something different from the mere sum of its parts and that it thereby expands to achieve offensiveness under the Glass-Steagall Act.

With my position as to the Act only a minority one, detailed discussion of the additional issue, raised in No. 59, as to the propriety of the exemption granted by the Securities and Exchange Commission, would be superfluous. Suffice it to say that I am in accord with the views expressed in the respective opinions on this issue in the Court of Appeals, 420 F. 2d, at 91–95, and at 108, and, in particular, by Chief Judge Bazelon when he carefully examined the four "danger zones" considered by the SEC and the protections erected against them, and then concurred in the Commission's exercise of judgment. I, too, feel that the Commission did not act arbitrarily or exceed its statutory authority and that its determination deserves support here.

I would affirm the judgments of the Court of Appeals.